

**Renouncing the Old Rules of the Game:
Crown Conduct in the Context of
Litigation Involving Aboriginal Peoples**

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Executive Summary

Since *Calder v. A.G. British Columbia* was decided in 1973, there has been a constant and ever increasing incidence of litigation involving Aboriginal peoples and the Crown on a wide range of issues. Because of the unique historical relationship between Aboriginal peoples and the Crown and the policy of British and later Canadian governments, most claims by Aboriginal peoples are made against the Crown. Given the nature of the relationship between the Crown and Aboriginal peoples, the manner in which such litigation is conducted should be scrutinized carefully.

The conduct of both the federal and the provincial Crown in dealings with Aboriginal peoples, including conduct surrounding litigation, must be examined in light of an historical relationship between the parties that, as the courts have emphasized, requires the Crown, or the government, to "protect" the interests of the Aboriginal peoples. Section 35(1) of the *Constitution Act, 1982* incorporates this fiduciary duty owed by the government to Aboriginal peoples and renders it a superadded, constitutional duty incumbent upon both levels of government and their authorities. The fiduciary duty is not merely a duty to refrain from infringing upon or denying Aboriginal and treaty rights — it is a positive duty to ensure that these rights are recognized and affirmed.

For twenty years now, the Supreme Court has clearly been signalling that the law must evolve with the times. In light of these benchmark directions from the Supreme Court, as well as from lower courts, the inquiry in this paper is whether the Crown, in the context of litigation against Aboriginal people, has discarded ancient concepts, embraced the growing sensitivity to Aboriginal rights in Canada, and renounced the old rules of the game.

There is little doubt from the record that the Crown litigates enthusiastically and vigorously against Aboriginal people and Aboriginal interests. It is also clear that Crown counsel functions in a context that is inherently biased in favour of non-Aboriginal interests. Furthermore, before the 1970s, Aboriginal people were virtually shut out of the Canadian justice system, and much of the jurisprudence that affects their rights and claims was determined without their participation.

This inquiry into the conduct of the Crown also reveals that, in exercising the current available options, First Nations seeking recognition of their rights and protection of their claims or resolution of grievances face substantial systemic obstacles. The specific and comprehensive claims processes are biased, inadequate, and extremely slow mechanisms for settling these claims. Under these processes the government of Canada enjoys the position of being the final arbitrator of disputes to which it is an interested party. This is a violation of the most basic standards of impartiality and fundamental justice. Furthermore, a very onerous burden of proof is imposed on those seeking to invoke their Aboriginal or treaty rights.

For these reasons, many First Nations turn to litigation in the courts as the only option available for those seeking remedies through a process not controlled by the government. Yet, a very onerous burden of proof is imposed in the courts as well. As a result, a tremendous financial burden is involved in litigating Aboriginal and treaty rights issues, one that must be borne by First Nations, whose membership constitutes some of the most financially disadvantaged people in Canada. Only extremely limited financial assistance is available under provincial legal aid plans and the federal test case funding program — which is, moreover, administered at the discretion of the federal department of Indian affairs.

An examination of the conduct of government officials in a number of specific cases of litigation leads to the conclusion that, given the behaviour of the Crown and its agents in the cases described, the requisite standard of conduct is not being met. This examination reveals that

- the litigation stances adopted by the Crown in litigation with Aboriginal people is conceived with little consideration for the duties owed to Aboriginal peoples or the importance of law reform;
- the Crown appears willing to use all available procedural devices to defeat claims by Aboriginal peoples;
- the conduct of agents of the Crown, such as wildlife officers, that precedes litigation is of great importance, because it quite often determines which cases and which fact situations go to the courts. In certain cases this conduct has been unquestionably in violation of the Crown's fiduciary obligations to the Aboriginal peoples involved;
- in certain instances the Crown has brought multiple charges for the same offence against members of a single Aboriginal community that is raising a defence based on Aboriginal or treaty rights; and

- following victories by Aboriginal peoples in the courts, governments often take a protracted amount of time to respond to the court's conclusions and seek, more often than not, to define the effect and extent of the judgement's application narrowly.

The Canadian cases and conduct summarized in this paper indicate that there are substantial systemic obstacles facing Aboriginal peoples trying to establish their rights. It is evident that in Canada the Crown's priorities in litigation with Aboriginal people are almost always opposed to the interests of First Nations.

In considering the problems revealed in this inquiry and possible solutions to them, the United States experience is worthy of comparison. There the federal government plays a major role in actively advocating and advancing the rights of Native Americans in the courts. However, the Bureau of Indian Affairs has also come under frequent criticism for its mismanagement of trust resources and violation of its trust responsibility to individual Indians and tribes.

Recommendations are made to rectify the problems identified in the paper. It is recommended that

1. First Nations organizations be entitled to the same rights with respect to interventions in cases involving their rights as are currently enjoyed by the provinces and the federal government.
2. A separate government department be created that is charged solely with the advancement of the fiduciary obligation owed by the federal government to First Nations.
3. A national case management system be instituted.
4. An independent tribunal be established to hear and be the trier of fact in cases involving Aboriginal and treaty rights or claims against the Crown.
5. Federal and provincial statutes, regulations and policy be subject to a mandatory review to bring them into line with the law as stated by the courts in Aboriginal matters.
6. A moratorium be implemented on multiple charges for similar offences.
7. The courts retain jurisdiction in complex cases.
8. Changes be made to the test case funding program.
9. There be full disclosure with respect to public funds allocated to litigating against Aboriginal people.
10. The Crown disavow the use of procedural technicalities as a method of defeating cases involving Aboriginal or treaty rights or claims against the Crown.

Renouncing the Old Rules of the Game: Crown Conduct in the Context of Litigation Involving Aboriginal Peoples

by Peter W. Hutchins and Anjali Choksi

Introduction

In its judgement in *R. v. Sparrow* the Supreme Court of Canada directed:

[T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.¹

Since *Calder v. A.G. British Columbia*² was decided in 1973, there has been a constant and ever increasing incidence of litigation involving Aboriginal peoples and the Crown on a wide range of issues. Given the historical and contemporary relationship between the Crown and Aboriginal peoples, the manner in which such litigation is conducted should be scrutinized.

First Nations find themselves in an untenable situation: owing to the unique historical relationship between Aboriginal peoples and the Crown and to the policy of British and later Canadian governments (enshrined in the *Royal Proclamation of 1763*) that Aboriginal lands could be surrendered only to the Crown, most claims by Aboriginal peoples are against the Crown. However, this unique relationship and restriction on alienation has also created a situation where the party against whom First Nations hold most of their grievances is also the party with whom they stand in a fiduciary relationship.³

In this report we outline the key features of the historical relationship between the Crown and Aboriginal peoples. We explore the manner in which the conduct of the Crown in circumstances surrounding litigation with Aboriginal peoples has or has not met the standard required by this relationship as confirmed in *Sparrow*. We study the general nature of the litigation process between the Crown and First Nations, as well as specific examples of Crown conduct, and examine how those examples are the product of the current litigation process. Suggestions for reform of the system are then presented.

We emphasize that our research on how litigation on Aboriginal matters is conducted reveals that the problem is not so much at the level of individual actions; rather it is systemic.

There is little doubt from the record that the Crown litigates enthusiastically and vigorously against Aboriginal peoples and Aboriginal interests and that this "no holds barred" approach has, on occasion, drawn criticism from the courts, as was the case with Madam Justice Wilson's remarks in *Guerin v. The Queen* on the use of the Crown's tactics invoking the "political trust" defence.⁴

Crown counsel functions, however, in a context that is inherently skewed in favour of non-Aboriginal interests. It is not the intention here to criticize counsel conscientiously carrying out their mandate; it is rather to question the appropriateness and fairness of that mandate. To the extent that the mandate involves continuing vigorously to prosecute Aboriginal persons for pursuing activities long recognized in treaties and by the courts or to argue outmoded precedents or the Crown's own turpitude to deny rights, that mandate must be questioned.

Aboriginal peoples have been virtually shut out of the Canadian justice system for more than a century, and much of the jurisprudence that affects their claims, beginning in Canada with the *St. Catherine's Milling* case, was established without the participation of First Nations. From 1927 until 1951 the *Indian Act* prohibited anyone from raising money to finance Indian claims.⁵

The result has been that a jurisprudential foundation was laid without the Aboriginal peoples of Canada having the opportunity to defend and advocate their legal position before the courts. The British Columbia Court of Appeal, in *Delgamuukw v. The Queen*,⁶ clearly expressed not only unease but rejection of the notion that declarations be made by courts affecting the rights of parties without those parties being present in the proceedings. Yet this is exactly what transpired with respect to the rights of Aboriginal peoples during the first one hundred years of Confederation. It is understandable, therefore, that Aboriginal peoples cannot and should not accept a jurisprudential status quo forged in their absence and that consequently strongly favours governments and non-Aboriginal parties.

We suggest that this observation should lead to two conclusions. First, given the conditions under which early precedents were established, it is not appropriate for the Crown to continue to invoke these authorities or actively to resist attempts to have the courts re-examine earlier authorities. Second, it is appropriate that Aboriginal peoples insist on having the state of

the law re-examined by the courts in the light of contemporary values and in the face of more detailed and sophisticated historical, anthropological and archeological research.

For the Crown to continue to invoke earlier precedents is rather like suggesting that earlier debates over whether women were persons are still relevant in litigation respecting sexual equality.

For twenty years now, the Supreme Court has been signalling clearly that the law must evolve with the times, that it is not business as usual.

In 1973 in *Calder v. Attorney General of B.C.*, Mr. Justice Hall condemned the practice of invoking "ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete".

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect subhuman species. This concept of the original inhabitants of America led Chief Justice Marshall in his otherwise enlightened judgment in *Johnson v. McIntosh*, which is the outstanding judicial pronouncement on the subject of Indian rights to say, "But the tribes of Indians inhabiting this country were fierce savages whose occupation was war..." We now know that that assessment was ill-founded. The Indians did in fact at times engage in some tribal wars but war was not their vocation and it can be said that their preoccupation with war pales into insignificance when compared to the religious and dynastic wars of "civilized" Europe of the 16th and 17th centuries. Marshall was, of course, speaking with the knowledge available to him in 1823. Chief Justice Duff in the judgment under appeal, with all the historical research and material available since 1823 and notwithstanding the evidence in the record which Gould J. found was given "with total integrity" said of the Indians of the mainland of the Indians of the mainland of British Columbia:

... They were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property.

In so saying this in 1970, he was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before.⁷

In 1984 in *Simon v. The Queen*, an appeal examining the status and effect of a 1752 treaty between the British Crown and the Mi'kmaq, the Crown invoked a 1929 decision of Acting Judge Patterson in *R. v. Sillaboy*.⁸ Judge Patterson had this to say about the capacity of Indian nations to enter into a treaty:

Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.⁹

In his reasons in *Simon*, Chief Justice Dickson, after quoting that passage, had this observation:

It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.

Of course in 1982, the Canadian legal landscape was altered considerably by the coming into force of the *Constitution Act, 1982*. The supreme law of Canada now specifically directed and mandated *recognition* and *affirmation* of existing Aboriginal and treaty rights.

In 1990, in *R. v. Sparrow* the Chief Justice and Mr. Justice LaForest, speaking for the Court, referred with approval to Professor Lyon's analysis of the effect of the *Constitution Act, 1982*:

...the context of 1982 is surely enough to tell us that this is not a just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.¹⁰

In light of these benchmark directions from the Supreme Court of Canada, not to mention similar admonitions from lower courts, the inquiry is whether the Crown, in the context of litigation against (for it is virtually always against) Aboriginal peoples, has discarded ancient concepts, embraced a growing sensitivity to Aboriginal rights in Canada, and renounced the old rules of the game.

The Fiduciary Relationship

We have suggested that the conduct of the federal and provincial Crowns in their dealings with Aboriginal peoples, including conduct surrounding litigation, must be examined in light of the historical relationship between the parties. In this section we outline the nature of that relationship and its implications today.

Historical Nature of the Relationship

When they arrived in the Americas, the European colonial powers took part in and became part of an existing political structure. They formed military and trading alliances with First Nations and in so doing became parties to existing alliances. Ultimately, as greater numbers of Europeans settled in North America and the Aboriginal population dropped drastically as a result of the influx of European diseases hitherto unknown in the Americas,¹¹ the balance of power in North America shifted. Alliances became European-driven, and First Nations participation often furthered the interests of the colonial powers.

This is not to say that Aboriginal peoples were not driven primarily by their own economic and political self-interest; however, that self-interest increasingly became bound up with the interests of Great Britain, France or the United States.

To secure alliances with First Nations, the colonial powers incurred obligations for the protection of the rights of their allies. Time and again, Britain, France and the United States secured military and economic alliances with First Nations on the basis of undertakings to protect the trading and territorial interests of those First Nations. Even in treaty instruments in which there was no direct First Nations participation, the colonial powers included provisions that applied only to and served the interests of the Aboriginal peoples. For instance, article xv of the Treaty of Utrecht (1713), article iii of the Jay Treaty (1794), and article ix of the Treaty of Ghent (1815) all treat the First Nations as peoples independent from the other inhabitants of North America and recognize special and particular rights to the Aboriginal peoples. These provisions were inserted in the treaties as recognition for the military and economic debts owed to Aboriginal peoples.¹²

Thus, the political and economic viability and the success of the colonial powers in North America resulted from their relationship with Aboriginal peoples. The debt owed to Aboriginal

peoples is manifested in the fiduciary duty that has been recognized explicitly in numerous treaties, in the negotiations leading up to those treaties, and in official edicts such as the *Royal Proclamation of 1763*.

Judicial Recognition of the Nature of the Relationship

From the earliest judgements on the issue of the rights of the First Nations, courts have emphasized that the relationship of the parties requires the Crown, or the government, to 'protect' the interests of the Aboriginal peoples.

One of the first judgements exploring the nature of the relationship between the Indian nations and the colonial powers was *Worcester v. State of Georgia*. In that judgement Chief Justice Marshall of the United States Supreme Court described the policy of Great Britain:

[S]he [Great Britain] considered them [the Indian nations] as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.¹³

This notion of the Indian nations governing themselves, of being 'dependent allies' under the protection of the colonial powers, permeates the pioneering judgements.¹⁴ It is also expressed in Canadian judgements.¹⁵ Many key instruments of the colonial period also enshrine this concept. The *Royal Proclamation of 1763* invokes the protectorate relationship, referring to First Nations as "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection...".

In the years preceding Confederation, the need for protection of Aboriginal peoples was expressed in the British Parliament in a report of the Select Committee of the House of Commons on Aborigines (British Settlements), which was established in 1835 and reported in 1837. The committee concluded that the duty to protect the interests of the Aboriginal peoples should be managed by the executive government, and not left to the colonies, to avoid any conflict of interest:

The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the Executive Government, as administered either in this country or by the Governors of the respective Colonies. This is not a trust which could conveniently be confided to the local Legislatures.... For a local

Legislature, if properly constituted, should partake largely in the interests, and represent the feelings or the settled opinions of the great mass of the people for whom they act. *But the settlers in almost every Colony, having either, disputes to adjust with the native tribes, or claims to urge against them, the Representative body is virtually a party, and therefore ought not to be the judge in such controversies...*¹⁶

Already in 1837, there was deep concern that the trust-like duties owed to Aboriginal peoples would not be fulfilled by a local legislature because that legislature's interest in a given matter would prevent it from acting in fulfilment of its duties toward First Nations.

The Bagot Commission, which reported to the Legislative Assembly of the Province of Canada on the Affairs of the Indians in Canada in 1847, concluded similarly.¹⁷

Ultimately, when the provinces of Canada, New Brunswick and Nova Scotia formed a confederation in 1867, this concern that matters pertaining to the Indian nations remain in the control of the central body was manifested in section 91(24) of the *Constitution Act, 1867*. While the distribution of legislative powers between the government of Canada and the several provinces established in the *Constitution Act, 1867* allocated to the provinces exclusive powers over public lands belonging to a province (s. 92(5)), local works and undertakings (s. 92(10)), and property and civil rights in the province (s. 92(13)), Parliament was given responsibility for Indians and a specific class of lands and property, "Lands reserved for the Indians" (s. 91(24)). The purpose was protection of First Nations and their lands through the division of powers.

Shortly after Confederation, in a resolution seeking legislative control for the government of Canada with respect to the North West Territory and Rupert's Land, the Senate of Canada again emphasized the importance of the protectorate relationship between the Crown and the First Nations:

Resolved that upon the transference of the Territories in question to the Canadian Government, it will be the duty of the Government to make adequate provisions for the protection of the Indian Tribes, whose interest and well being are involved in the transfer.¹⁸

This resolution demonstrates recognition of the fact that the transfer of legislative and territorial rights over the territories in Canada brought with it the responsibility to protect the interests of the Aboriginal peoples.

There was another reason why relations with Aboriginal peoples had always remained with the central government. First Nations were crucial commercial and military allies and played pivotal roles in the battles between the colonial powers. Military and commercial policy was regulated by the imperial government and, as explained earlier, good policy dictated that relations with First Nations be cultivated and their rights respected. Local governments were far more interested in encroaching upon Aboriginal rights in their drive to settle the land and exploit resources. Therefore, from the earliest times, the central authority was pitted against the local authorities when it came to Aboriginal concerns. The *Royal Proclamation of 1763* is in part a product of this struggle between the two orders of government.

Notwithstanding the effect of this long-standing policy, the Royal Proclamation, subsection 91(24) of the *Constitution Act, 1867*, and the judgements and legal instruments cited earlier, the government of Canada argued until 1984 that its federal obligation was only of a political character. That year the Supreme Court of Canada released its judgement in *Guerin v. The Queen*, which recognized the legally enforceable fiduciary duty owed by the Crown to First Nations.

In *Guerin* the Supreme Court of Canada ruled that the Crown owed a fiduciary duty to the Musqueam Indian Band that regulated the manner in which it exercised its discretion in dealing with surrendered land on their behalf. The Court found that the duty had been breached. Chief Justice Dickson, writing for himself and three other judges, concluded that

the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*.

Given the unique character both of the Indians' interest in land and their historical relationship with the Crown, the fact that this is so should occasion no surprise.¹⁹

Section 35(1) of the *Constitution Act, 1982* incorporates this fiduciary duty owed by the government to Aboriginal peoples and renders it a superadded, constitutional duty incumbent upon both orders of government and their authorities.

In *R. v. Sparrow* the Supreme Court of Canada developed further its analysis of the legal nature of the fiduciary duty owed by the Crown to Aboriginal peoples. In a passage cited in the introduction to this study, the court concluded that

the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is

trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.²⁰

On the subject of the meaning of subsection 35(1) of the *Constitution Act, 1982* the court held that:

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. *Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. ...*

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.²¹

The fiduciary duty is not merely a duty to refrain from infringing upon or denying Aboriginal and treaty rights; it is a positive duty to ensure that these rights are recognized and affirmed.

Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. *By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification.* The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.²²

Thus, the fiduciary duty encompasses more than simply the protection of the rights of First Nations; it extends to the *advancement* of those rights. The United States Supreme Court has affirmed that "Fundamentally, the vindication of Native American rights has been the institutional responsibility of the Federal Government since the Republic's founding".²³

The fiduciary obligation is held principally by the federal government, but it is shared with the provincial governments in areas where they exercise constitutional jurisdiction.

According to Brian Slattery:

The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the *Constitution Act, 1867*, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.²⁴

The commissioners of the Aboriginal Justice Inquiry of Manitoba have also taken the position that the fiduciary obligation binds the provincial Crowns:

Our courts have established an entirely new approach toward the examination of original legal issues, which includes the fiduciary obligation, the content of Aboriginal title, and the scope of Aboriginal and treaty rights. This approach applies to all legislation, whether or not Aboriginal peoples or their unique legal rights are mentioned. The broad thrust of the law covers both federal and provincial legislation because both levels of government owe a fiduciary duty to all Indian, Inuit and Metis people.²⁵

Thus, the implications of the historical relationship are immense. They extend not only to the Crown's legislative functions but to all aspects of its relationship with First Nations.

Current Options Available to First Nations Seeking to Invoke Their Rights

One cannot assess the standards of conduct of the Crown during litigation without first examining the options available to First Nations seeking validation of their claims or resolution of grievances against the federal government.

A First Nation with such a grievance has two options: to go to court or to proceed by way of specific or comprehensive claim under the federal government's stringent guidelines with respect to these processes.

Both the specific and the comprehensive claim process have been roundly criticized by First Nations for being biased, inadequate and out of date mechanisms for settling their claims.

Perhaps the most fundamental criticism levelled against the processes is that under them the government of Canada enjoys the position of being the final arbitrator of disputes in which it is an interested party. This is a violation of the most basic standards of impartiality and fundamental justice.

Moreover, First Nations pursuing claims under these processes also have to meet a formidable burden of proof. The government's requirements for adequate proof under the claims processes is as onerous as that required by a court of law. The claims processes have also been criticized for being subject to the control of the federal justice department. The claims submissions are refused or accepted for validation on the basis of opinions from the department that are not available to the First Nations party making the claims submission. Thus, they cannot even know the case being made against their claim.

Moreover, it appears that one of the government's criteria for assessing the performance of its negotiators is whether they manage to settle a claim at less than the maximum amount approved for settlement.²⁶

The processes are also painfully slow. For instance, the Nis'ga comprehensive claim, accepted for negotiation in 1976, has not yet been resolved; nor has the claim of the Conseil Atikamekw/Montagnais, which was accepted for negotiation in 1979. Of 33 claims accepted for negotiation since the policy took effect, seven have been settled as of the date of writing.²⁷

The specific claims process is also extremely slow. Of the 515 claims filed by February 1989, only 38 had been settled — and of these, 11 were inter-related British Columbia cut-off claims and 9 were inter-related Saskatchewan ammunition claims.²⁸

In 1991 the federal government created the Indian Claims Commission to conduct inquiries and issue recommendations on specific claims that had been rejected by the government and to mediate issues in outstanding claims negotiations. The commission has jurisdiction with respect to matters falling under the specific claims policy. It is essentially a commission of inquiry that conducts impartial inquiries, either when a First Nation disputes the government's rejection of its specific claim or when a First Nation disagrees with the compensation criteria used by the government in negotiating the settlement of a claim. Unfortunately, the commission does not have jurisdiction until such time as a claim has been accepted or rejected by the government.

The result of these shortcomings is that many First Nations have turned to the courts because they have no other avenue through which to seek justice for outstanding claims. Still other First Nations have been forced to seek redress in the courts because their claims against the government do not meet the government's exacting definition of what constitutes a specific or a comprehensive claim.²⁹ The judicial process is essentially the only one available to Aboriginal peoples seeking remedies for their outstanding claims that is not controlled by the government.

Yet the court option is not without obstacles. Taking a case on Aboriginal or treaty rights to court is an extremely expensive venture. A very onerous burden of proof is imposed upon those seeking to invoke their Aboriginal rights.³⁰ Many judges approach such cases with their own biases, leaving the burden on Aboriginal litigants to demonstrate how accepted theories, based entirely on the colonialists' accounts of history, are invalid.

Perhaps most significant, such litigation almost always involves at least one order of government, and invariably the government is on the opposing side. The difficulties involved in suing the government, which does not suffer from the same financial limitations as Aboriginal parties, are notorious.³¹

Financial Considerations Involved in Instituting and Defending Legal Proceedings on Aboriginal and Treaty Rights

Under current Canadian case law, the burden of proof in establishing an existing Aboriginal or treaty right lies on the Aboriginal parties claiming the right, and the opposing party bears the burden of proving that such right has been extinguished.³²

Previous cases demonstrate that this burden is tremendous. Expert witnesses are brought in by both sides to prove and disprove the existence of Aboriginal or treaty rights. Historians, anthropologists, archaeologists and sociologists are often employed to testify and submit reports. In most cases elders and representatives of the First Nations community will also testify.

The interlocutory application of the Crees in *Kanatewat v. James Bay Development Corporation* in 1973 lasted some 26 weeks, the trial in *A.G. Ontario v. Bear Island Foundation* lasted 24 weeks, and the trial in *Delgamuukw v. The Queen* lasted 75 weeks. While not all Aboriginal law cases continue for such a long time, such cases are typically heard over a number of weeks or months.

The trend, in fact, has been to increasingly longer trials on these issues. In 1973 the *Calder* trial was argued over only four days.³³ This was because the government had been willing to admit that the Aboriginal parties had occupied the territory in question before contact with the Europeans. Such admissions are rarely made today.³⁴ Indeed, in its factum before the Supreme Court of Canada in *R. v. Sparrow*, the federal government insisted that:

The burden of proof of the factual existence of the aboriginal right asserted by the Appellant on April 17, 1982 rests upon the Appellant. To discharge this burden, the Appellant is required to adduce extensive and well-substantiated evidence.³⁵

Thus, a tremendous financial commitment is involved when litigating Aboriginal and treaty rights issues. This financial commitment must be borne by First Nations, whose membership constitutes some of the most financially disadvantaged peoples in Canada.³⁶

The only financial assistance that Aboriginal peoples can receive for litigation before the courts is that available under regular legal aid plans, which are subject to numerous restrictions, and limited funding from the federal government through the test case funding program. This program is intended to facilitate the resolution of First Nations-related legal issues and to build up a body of legal precedents for the benefit of both Aboriginal peoples and the federal government. According to the government, "[f]unding under the program is discretionary; the federal government recognizes no legal or constitutional obligation to provide litigation funding to Indians".³⁷

The test case funding program has been criticized by Aboriginal peoples. The funding applies only to cases at the appeal level; no financial aid is available at the critical and most expensive first stage of an action, which is usually the longest, involves the most preparation, and entails expenditures for witnesses and historical and anthropological research. No funding is available to interveners except in "exceptional cases". The most damaging of all these criticisms is that the program is wholly administered by the Indian affairs department, which determines which cases merit receiving funding and which "exceptional cases" warrant intervener funding.

In most Aboriginal law cases the Indian affairs department or the justice department is involved, either as complainant or as defendant. Thus, the manner in which the test case funding program is administered has created a situation in which a party to an action determines whether crucial financial support should be made available to its adversary. The conflict of interest is manifest.

Some lawyers contend that the justice department, which represents Canada in actions before the court, is directly implicated in test case funding and makes recommendations on which cases should be funded. Such a situation is intolerable.

Government Conduct in the Context of Litigation with Aboriginal Peoples

All the factors just outlined must be kept in mind when scrutinizing the conduct of government surrounding litigation with Aboriginal peoples. In this section we examine the conduct of government officials in a number of specific cases. Where applicable, we also examine how the conduct affected the outcome of litigation. Because of the ever-increasing incidence of litigation between Aboriginal peoples and the Crown and the number of different jurisdictions involved, it was impossible to examine all such litigation. We therefore concentrated, for the most part, on well known cases that reached appellate courts. What we have extrapolated from these cases is not that the Crown behaves a certain way in all cases, but that, given the behaviour of the Crown and its agents in the cases described, the requisite standard of conduct is not being met.

Conduct During Litigation

St. Catherine's Milling and Lumber Company v. The Queen

This case is one of the foremost examples of the extent to which questions of Aboriginal rights have been determined within the framework of federal/provincial contests. The purpose of the discussion of Indian title in the case was not to discover the true nature of that title but, rather, "each side manipulated the notion of Indian title in its attempt to win the resources of the disputed territory".³⁸

The *St. Catherine's Milling* case was the first action in Canada in which the nature of 'Indian title' was argued before the courts and the first Canadian case on the subject that was argued to the Privy Council. Although some of the conclusions contained in the Privy Council's decision have been overruled by the Supreme Court of Canada,³⁹ many continue to consider the case a leading one on the nature of Aboriginal title, and it is cited often by litigants and by the courts. Even the lower court decisions are cited frequently. It is therefore important to look at the context of this case and the governing interests of the two parties that argued it.

The federal government's claim was argued through the *St. Catherine's Milling and Lumber Co.*, which acted as a proxy for the dominion government. The issue was which

government, the dominion or Ontario, owned the land over which Aboriginal title had ostensibly been extinguished by Treaty 3. The federal government's proprietary rights in the area in question were those that had been granted to it by the Aboriginal parties to Treaty 3. Therefore, the dominion argued that the Aboriginal peoples had owned the land and the resources and had passed them to the federal government in Treaty 3.

The Ontario government adopted the definition of Indian title that was felicitous to its position, arguing that the Aboriginal people had no concept of property recognizable in law and that, in any event, upon discovery, title to those lands belonged to the Crown in right of Great Britain by virtue of discovery and settlement.⁴⁰

A great deal of research was expended for the arguments of both parties. However, as Cottam points out, "the goal for both sides was not historical accuracy but a plausible rationale either in support of, or against, the notion that the Aboriginal population of North America held title in fee simple to the land".⁴¹ The impetus for one of the leading Canadian judgements on the nature of Aboriginal title was thus nothing more than a federal/provincial feud over resources.

An exchange between Lord Watson and counsel for the province before the Privy Council, cited in Cottam, provides a crucial example of how insignificant questions surrounding the actual nature of Aboriginal title were in the case. Lord Watson asked, "What difference do you think it makes to your case that the Indian title should be greater or less so long as there is a substantial interest underlying it in the Crown? Does the precise extent or limit of the Indian title matter much...so long as there is left a right in the Crown, a substantial right, not a mere casualty which will depend on the Indian title but a substantial title?" Counsel for the province replied, "So long as it is agreed there is such an interest [in the Crown]...I care for nothing more".⁴² Hall comments that in this case, "Indians seemed to exist more as theories than as people on both sides of the debate...".⁴³

One author has criticized the lawyers for the dominion government in this case for overlooking a number of legal and historical arguments and failing to use available resources and information about the nature of the Ojibwa society whose rights they claimed.⁴⁴ He points out that the dominion government never thought to use an Aboriginal person from the Treaty 3 area as a witness at trial to explain their concept of title, which was, at least in theory, one of the core aspects of the case. The government did not even use a quotation from Alexander Morris's book, *The Treaties of Canada With the Indians*,⁴⁵ which gives an account of the negotiations leading

up to a number of treaties, including Treaty 3. Surely statements made by the Ojibwa chiefs at the negotiations for the treaty were highly relevant to the questions being debated in the *St. Catherine's Milling* case. Smith notes further that at no stage in the appeal did lawyers for the dominion government ever challenge the trial court's conclusion that the Ojibwa were in a nomadic state without fixed abodes, even though there were published sources available that described Ojibwa society as one with laws and customs delineating their hunting grounds.

The position of the Ontario government in this case and the legal arguments adopted by it are manifestations of why the Select Committee recommended in 1837 that Aboriginal affairs be managed by a central, not a local government. The province's interests pitted it against the rights of Aboriginal peoples.

Clearly the Select Committee was correct in concluding that it was in the interests of Aboriginal peoples to have their affairs overseen by a central authority. This does not, however, circumvent the potential for conflicts of interest within that authority. In formulating its arguments in favour of a proprietary right of ownership for Aboriginal peoples, the federal government was clearly acting in its own best interests, since the argument in favour of Aboriginal proprietary rights was purely a function of the argument in favour of federal ownership rights.

This potential conflict of interest inherent in the federal government's position in the *St. Catherine's* case was underscored and manipulated to its benefit by counsel for the province. Ontario even went so far as to contend before the Privy Council that its position was more beneficial for the Aboriginal peoples than that of the federal government.

Counsel for the province contended before the Privy Council that the federal government could meet its role as protector of Aboriginal interests only if it were not the beneficiary of the Aboriginal interest in land ceded by treaties. The province argued that the dominion's role was to be that of "independent, disinterested intervention" on behalf of Aboriginal peoples. This it could not do if it were the beneficiary of a cession of Aboriginal rights.⁴⁶

Of course, as we have noted, this conflict exists. Nevertheless, as noted by Hall, it was ironic that Ontario's argument for the federal government's role as vindicator of Aboriginal rights was part of a larger thesis that denied recognition to those rights.⁴⁷

St. Catherine's Milling was the first of many cases in which issues critical to Aboriginal peoples were debated and decided in the context of federal/provincial disputes without any

genuine consideration of the Aboriginal rights involved or of the interests of Aboriginal peoples themselves. The conflict of interest that is apparent from this case arises repeatedly in subsequent litigation.

A.G. Ontario v. Bear Island Foundation

This action began when the defendants, members of the Teme-Augama Anishnabay, filed cautions in the land titles office over an area of land to which they claimed Aboriginal rights, including title. The plaintiff, the Attorney General of Ontario, took an action to have the cautions removed. Ontario asserted that the Teme-Augama Anishnabay had no rights, title or interest in the disputed territory.⁴⁸

The Teme-Augama Anishnabay issued a counterclaim contending that they had Aboriginal rights, including title and jurisdiction, to the disputed territory. By way of defence to the counterclaim, Ontario argued that any rights that the Teme-Augama Anishnabay had in the territory were surrendered by the Robinson-Huron Treaty of 1850 or by Treaty No. 9 of 1905 and 1906, or were lost by virtue of limitation periods or estoppel or by various legislation of the province or the federal government.

As part of its no holds barred approach to the case, Ontario had originally alleged that the Teme-Augama Anishnabay became signatories to the Robinson-Huron Treaty through Chief Metigomin, or through Chief Shabokeshik or through Chief Tagawinini. After examination for discovery, Ontario eventually settled on the Tagawinini theory.⁴⁹

A notice of constitutional question was issued to Canada, which took part in the trial but only on constitutional issues, not as a party.

At trial and in the appeals Canada sided with the province of Ontario against the Teme-Augama Anishnabay. Perhaps the most crucial issue on which Canada sided with Ontario was with respect to whether the Teme-Augama Anishnabay had become parties to the Robinson-Huron Treaty of 1850.

Even though this issue was not, strictly speaking, a constitutional issue, and Canada was represented at trial only with respect to constitutional issues, Canada nevertheless took the position at trial, and thereafter, that the Teme-Augama Anishnabay had become parties to the Robinson-Huron Treaty. What is most disquieting about Canada's position on this issue is that from 1883 until the date of the trial, Canada had consistently taken the position that the

Teme-Augama Anishnabay were a distinct 'band' of Indians and were *not* parties to the Robinson-Huron Treaty of 1850.⁵⁰

For more than one hundred years the Teme-Augama Anishnabay were denied rights under the Robinson-Huron Treaty. They had no reserve until 1970, and then only a small amount of land in a location that was not of their choice. As parties to the Robinson-Huron Treaty they would have had treaty rights to hunt and trap; however Ontario made an effort to prosecute members of the Teme-Augama Anishnabay when they exercised their Aboriginal hunting rights and effectively denied them the right to exercise hunting and fishing rights recognized by the treaty. They were even denied the right to cut wood for fuel and the construction of houses and fences, since part of their territory had been deemed a forest reserve by the province of Ontario.

In 1894 Canada had even suggested to the province that they go to arbitration on this matter.⁵¹ Canada's position remained unchanged throughout the years: the Teme-Augama Anishnabay were not parties to the Robinson-Huron Treaty of 1850. In 1975 Judd Buchanan, then minister of Indian affairs, wrote to Lloyd Barber, commissioner of Indian claims, reiterating the federal government's position that the Teme-Augama Anishnabay were not parties to the Robinson-Huron Treaty. He suggested further that the parties prepare to authorize representatives to negotiate a settlement.⁵²

The result of the federal government's reversal of position at trial was that the Teme-Augama Anishnabay suffered a double denial of their rights. For more than one hundred years they were denied meaningful treaty rights under the Robinson-Huron Treaty because the federal government insisted that they had never signed the treaty. At times members of the band received some payments equivalent to treaty payments, but this was the extent of their benefits. They were denied important treaty rights such as recognition of their hunting and fishing rights and their right to an appropriate reserve. Then, when the community finally went to court, the federal government took a position that effectively denied them the benefits of their claim to unextinguished Aboriginal rights.

We do not know the motives of the federal government in reversing its position on this vital issue once litigation began. However, we can conclude the following: the reversal in position appears to have been precipitated by the onset of litigation; this reversal was detrimental to the Teme-Augama Anishnabay and deprived them of a vital ally in the court case; this reversal was beneficial to the province of Ontario, which would otherwise have had to argue that the

Teme-Augama Anishnabay were parties to a treaty with Canada — in the face of the denial of both parties to the treaty; the reversal of position was also to the benefit of the federal government, which would have found itself, at least indirectly, liable had the court ruled in favour of the Teme-Augama Anishnabay.

The federal government's reversal of position was a violation of their fiduciary duty to the Teme-Augama Anishnabay. Clearly the government protected and defended other interests over the interests of the Aboriginal people involved. This defence of other interests seriously prejudiced the interests of the Teme-Augama Anishnabay.

Delgamuukw v. The Queen in Right of British Columbia ⁵³

In this action the plaintiffs, representing themselves and members of the Gitksan and Wet'suwet'en First Nations, sought declarations against and damages from the province of British Columbia on the basis of their Aboriginal rights, including title and jurisdiction. The province sought, and obtained, an order to have the federal attorney general added as a defendant to the action.

The plaintiffs lost the action at trial in the British Columbia Supreme Court. They appealed to the British Columbia Court of Appeal. Following the filing of both the appellants' and the respondents' memoranda of argument, and only two months before the appeal was scheduled to be heard, the province applied to the court to file a revised memorandum of argument. A few months earlier, a provincial election had resulted in a change of government. The new government reversed the province's position on Aboriginal rights and admitted for the first time that Aboriginal rights existed in British Columbia. The new memorandum of argument was intended to reflect this revision of position.⁵⁴

The province's modification of position did not, however, result in any benefit to the First Nations appellants, as one might have expected. This is because, *at the province's request*, the appeals court appointed the province's previous counsel as *amicus curiae* in the appeal. Their role was to maintain the hard-line position adopted in the province's original factum and make presentations in court on the basis of that position. Thus, while the province espoused a more moderate position in its factum, the *amicus curiae* adopted the previous severe position as its own. Moreover, the new arguments adopted by the province still effectively denied the Gitksan and Wet'suwet'en the relief they were seeking.

The province's softening of its position also resulted in the attorney general of Canada revising its position and adopting a harsher stance than it had previously taken. This revision was accomplished by simply incorporating parts of the province's earlier factum into the new federal factum.⁵⁵

The net result was that the Gitksan and Wet'suwet'en were forced into the unenviable situation of defending their position against the different legal arguments adopted by the province, the *amicus curiae*, and the attorney general of Canada.⁵⁶

While it was certainly laudable that the province modified its position to incorporate some concept of Aboriginal rights, it clearly diminished any benefit that this would have given the Aboriginal parties when it took steps to ensure that the old position would still be in front of the court. Those efforts were diluted further when the attorney general of Canada incorporated many of the province's earlier arguments on key issues. The province's adoption of a new position served in fact as an added burden on the Gitksan and Wet'suwet'en.

The government's actions in this case are an example of how an attempt to fulfil its duty to Aboriginal peoples can backfire when the interests of the First Nations are not the governing concern.

Manitoba Metis Federation v. A.G. Canada

The plaintiffs sued the federal government, alleging that various federal and provincial statutes and orders in council passed in the late nineteenth century were unconstitutional because they had the effect of depriving the Métis people of land that they were entitled to under the *Manitoba Act, 1870*. The action was funded by the federal government. Despite this financial support, the federal attorney general brought an application to strike out the statement of claim on the grounds that it disclosed no cause of action.⁵⁷ This application was granted by the majority of the Manitoba Court of Appeal; the Supreme Court of Canada reversed the judgement of the Court of Appeal.

The judges of the Court of Appeal noted the irony of this approach:

I may say in parenthesis that I find it most extraordinary that as I understand it the federal government should be funding a lawsuit which the government's Attorney General is simultaneously attempting to kill at birth.⁵⁸

The incongruity of the present system within which First Nations must litigate their rights is obvious from this example. This does not mean that the government should refuse to fund

cases when it intends to make a motion to have the case struck out, but rather that it appears that the government exercises its right to make such motions with perhaps a bit too much frequency.

Surely once the government has made a political decision to fund a test case, the department of justice should be given instructions to refrain from taking any action to have the case struck out. This lack of coherence is yet another factor that leads to wariness of the Crown's conduct in litigation matters.

Re Paulette and Canadian Pacific v. Paul

In both these cases the federal Crown invoked jurisdictional reasons for its refusal to participate in litigation in which issues relating to Aboriginal title were being raised.

In *Re Paulette and Registrar of Titles* the action began in 1973 when chiefs of First Nations that were signatories to Treaties 8 and 11 filed caveats with the registrar of the Northwest Territories that essentially impeded any land transactions by non-Aboriginal people on the land covered by the caveats.⁵⁹ The registrar filed a reference under section 154 of the *Land Titles Act*, a federal statute, with the Northwest Territories Supreme Court to determine the validity of the caveats. At the initial hearing of the reference, counsel for the federal Crown challenged the jurisdiction of the Supreme Court of the Northwest Territories to hear the reference. They contended that the issue should properly be heard by the Federal Court of Canada. The Supreme Court of the n.w.t. reserved judgement on this issue and directed that the proceedings continue in the meantime.

The federal government then brought a motion for a writ of prohibition to the Federal Court to prevent the Supreme Court hearing the matter. Thereupon, the Supreme Court released its judgement on the jurisdictional issue, ruling that it had jurisdiction to hear the reference.⁶⁰ A few weeks later, the Federal Court released its judgement on the motion, also ruling that the Supreme Court of the Northwest Territories had jurisdiction to hear the reference.⁶¹

The proceedings resumed a few weeks after these two judgements on the jurisdictional issue. However, the federal government, which had filed an appeal of the judgement of the Supreme Court, withdrew from the proceedings. The Supreme Court judge, who called this an "almost contemptuous action" by federal Crown counsel, appointed a local lawyer to assist the court to obtain objectivity. The judge eventually ruled that the First Nations had a legal title and interest in the lands described in the caveat that could be protected by the filing of a caveat under

the *Land Titles Act*. The federal Crown appealed the rulings on the jurisdictional issue and the merits, and a majority of the Northwest Territories Court of Appeal allowed the appeal on the merits, holding that a caveat could not be filed except to protect derivative title from the Crown. The federal Crown participated in the hearing before the Court of Appeal.

The case of *Canadian Pacific v. Paul* arose when Canadian Pacific took injunction proceedings in the New Brunswick Supreme Court against members of the Woodstock First Nation to prevent them from interfering with a right of way claimed by cp by grant from the Crown before Confederation.⁶² The railway track running over the right of way ran through the Woodstock First Nation's reserve. Thus, the legality of the grant purporting to establish the right of way and its interrelation with Aboriginal rights on the reserve was at issue. The defendant First Nation filed a counterclaim stating that the land on which the right of way extended was part of the reserved lands vested in Her Majesty for their use and benefit. One of the principal issues in the case was, therefore, the nature of Aboriginal title.

The court added the attorney general of Canada as a defendant to the counterclaim. However, Canada made only a conditional appearance because it argued that any claim against it should be made in the Federal Court. At trial Canada's appearance was limited to arguing that cp could not plead prescription, because that defence affected the title of the federal Crown and that was a question that could be dealt with only by the Federal Court. On appeal to the New Brunswick Court of Appeal, Canada argued that the court had no jurisdiction to hear any part of the counterclaim by the First Nation because the whole matter was within the exclusive jurisdiction of the Federal Court.⁶³ The federal government did, finally, appear before the Supreme Court of Canada.⁶⁴

The New Brunswick Court of Appeal was clearly irritated by the lack of representation from the federal government. The court noted that "[t]he stance adopted on behalf of the Attorney-General seems rather surprising in light of the federal Crown's obligations to the Indians for whose use and benefit it holds the lands." The court added that "[o]ne would have thought the Crown had an honourable obligation to lend its name to the action in order to make certain the court could properly deal with the question of title...".⁶⁵

The federal government's refusal to participate in both these cases was contrary to orders from the superior courts. More significant for our purposes, the refusal to participate in a hearing on crucial questions surrounding matters of First Nations' rights and title was an affront to the

Aboriginal peoples in question. Questions surrounding the effect of federal statutes and federal responsibilities were at issue in both cases, and there was a definite requirement that the federal government participate. If the Aboriginal peoples, who commonly feel that the Canadian court system is foreign to their culture and traditions, could take part in these proceedings, surely the federal government ought to have done the same.

The federal government's conduct in these two actions demonstrates an obvious unwillingness to fulfil its fiduciary obligations to Aboriginal peoples.

Recently, in proceedings brought by the government of Quebec against Algonquins, members of the Eagle Village First Nation, under the federal *Fisheries Act* and regulations,⁶⁶ the federal attorney general was sent a formal notice from counsel for the First Nation that Aboriginal rights were being pleaded in defence of the charges. The attorney general responded by stating that while the federal government was very interested in the case, they did not intend to get involved in the proceedings at this stage.⁶⁷

Conclusion

Clearly the guiding principle in Crown litigation on Aboriginal issues, from the *St. Catherine's* case on, is to win the case. The stances adopted by the Crown in litigation with Aboriginal peoples are conceived with little consideration for the duties owed to Aboriginal peoples or the importance of law reform. As the Bear Island case demonstrates, these stances may be diametrically opposed to positions held before such litigation commenced. The *Delgamuukw* situation demonstrates that a litigation stance may be altered if it is felt that one party has softened its position. The Crown appears willing to use all available procedural devices to defeat claims by Aboriginal peoples.

The federal government has recently prepared a report containing general guidelines to assist managers in identifying and dealing with issues relating to the fiduciary relationship of the Crown with Aboriginal peoples. This report covers a wide variety of subjects including, fiduciary duties in the conduct of litigation. According to the report, while the federal government may intervene in litigation or appeals involving Aboriginal interests, its choice of whether to do so, and on what basis, remains with the federal Crown, because it must often take into account a range of interests and objectives.⁶⁸

It is precisely this taking into account of other interests and objectives that creates a conflict with the duties owed to Aboriginal peoples.

Conduct Preceding Litigation

The conduct of agents of the Crown that precedes litigation is of great importance because it quite often determines which cases and which fact situations go to the courts.

Judicial precedent is particularly important in the context of cases on Aboriginal and treaty rights. Therefore, when testing new issues before the courts, First Nations have often opted to proceed by way of test case to ensure that the optimum and least complicated fact situation goes before a judge hearing novel legal arguments. The Crown also proceeds in this manner in an attempt to build up a body of favourable precedent by controlling which fact situations become the subject of appeals before the appellate courts. Unfortunately, the Crown's priorities are antithetical to those of First Nations in this regard, and therefore the cases that are appealed to the higher courts are often based on unfavourable fact situations from the point of view of First Nations.

Moreover, the manner in which Crown agents conduct themselves in causing charges to be brought against Aboriginal people has a tremendous affect on the perspective members of First Nations bring to the Canadian justice system. The conduct of Crown agents, such as wildlife officers and police officers, is as important to Aboriginal people's perception of Canadian judicial institutions as the conduct of judges and Crown attorneys.

R. v. Wolfe

In this case the Aboriginal defendants, beneficiaries of Treaty 6, were charged with various offences of unlawfully trafficking in wildlife, contrary to Saskatchewan's wildlife legislation.⁶⁹

An official with the Saskatchewan department of parks and renewable resources was sent undercover to the area frequented by these persons to investigate suspicions of trafficking in wild meat. He encountered one of the defendants and asked him about obtaining some wild meat. The officer became acquainted with the other defendants and made numerous trips to the Onion Lake Reserve, where he purchased wild meat from some of the accused. He also accompanied some of the defendants on a hunting expedition. The investigating officer was working throughout under the supervision of a senior wildlife official.

At the initial meeting with one of the defendants, on each trip to the reserve, as well as on the hunting expedition, the undercover investigator took considerable amounts of beer and alcohol along with him or purchased drinks for the defendants. On two occasions he provided the defendants with money with which they purchased Listerine to drink. The officer had discussed with his supervisor taking beer to the reserve and had received approval for this action.

The defendants all had serious problems with alcohol abuse. They alleged that this should have been obvious to the wildlife investigator. The facts in evidence demonstrate that it was obvious that the defendants had alcohol-related problems.⁷⁰

The Onion Lake Reserve is a dry reserve; by-law 5-88 of the Onion Lake Band was enacted in 1988, with the approval of the members of the Onion Lake Band, specifically to prohibit the bringing of alcohol onto the reserve. Alcohol consumption is perceived as a significant community problem on the reserve, and the by-law was adopted to protect the community. The council of the Onion Lake Band gave the RCMP with a copy of the by-law for enforcement purposes. The community's concern with problems relating to alcohol consumption are long-standing and date back at least as far as the negotiations leading to Treaty 6 in 1876.

During those negotiations, representatives of the First Nation requested that the Queen "prevent fire water being sold in the whole of Saskatchewan".⁷¹ So important was this request and concomitant obligation on the part of the government that agreed to it, that it became part of Treaty 6, of which the defendants in this case are beneficiaries. The treaty provides that

Her Majesty further agrees with Her said Indians that within the boundary of Indian reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to be enacted, to preserve Her Indian subjects inhabiting the reserves or living elsewhere within Her North-west Territories from the evil influence of the use of intoxicating liquors, shall be strictly enforced.

It is obvious that the conduct of the wildlife official and his supervising officer violated the council by-law and departed dramatically from the undertakings set out in Treaty 6. The trial judge in the provincial court did not find that these facts led to a defence of entrapment. He held that alcohol was a major factor in the lives of the majority of the accused. Our purpose in highlighting this case is not to take issue with the judgements rendered by the courts. However,

we believe that the conduct of the wildlife officers in this case must be scrutinized in light of their obligations to Aboriginal peoples as agents of the Crown.

The behaviour of the wildlife officials was unconscionable. The fact that the defendants' problems with alcohol were so rampant should have made them even more meticulous in their efforts to keep alcohol out of the operation. The officials reneged on the duty established under Treaty 6 and acted without due regard to their fiduciary obligations, as agents of the Crown, to the accused. Treaty 6 establishes a clear obligation on the part of the Crown and its agents to prevent intoxicating liquors from entering the reserve as well as an obligation to enforce existing laws prohibiting the entry of alcohol. The existing law, by-law 5-88 of the Onion Lake Reserve, was also breached. The officers testified that they did not know that the Onion Lake Reserve was a dry reserve. However, the supervising officer was aware that dry reserves existed; he simply did not take steps to ascertain whether the Onion Lake Reserve had such a prohibition. Whether or not the facts were sufficient to create a defence of entrapment in the legal sense, certainly the actions of the wildlife investigator undermines respect for the justice system.

Such willful disregard of treaty obligations in causing hunting charges to be brought against Aboriginal people is obviously not in keeping with the Crown's fiduciary duty.⁷²

R. v. Jackson and R. v. Harvey

In *R. v. Jackson*, officials of the government of Ontario conducted a predawn raid of Aboriginal fishing activities on the basis of a complaint from the Bluewater Anglers' Association. Members of the Ontario Provincial Police, officers of the department of natural resources of the state of Michigan, and officers of the Ontario ministry of natural resources pursued and intercepted Aboriginal fishermen by boat, with guns drawn. They boarded and seized nets and gear.

The trial judge was extremely critical of the conduct of the agents of the Crown. After a careful examination of the judgement of the Supreme Court of Canada in *R. v. Sparrow*, he held that this behaviour "scarcely can be construed as an activity in which the government's relationship is trust-like rather than adversarial" and that "the honour of the Crown in so proceeding is not much in evidence".⁷³

Ultimately, the trial judge found that provisions of the legislation and regulations under which the Aboriginal defendants were charged were inconsistent with their constitutionally protected rights under section 35 of the *Constitution Act, 1982*. He granted them limited

immunity from prosecution under those provisions. The judge also held that the manner in which the raid was carried out, given the facts and attendant circumstances, was a violation of the defendants' rights under sections 8 and 10(b) of the *Canadian Charter of Rights and Freedoms* and that the evidence against them should not be admitted.

In the case of *R. v. Harvey*,⁷⁴ the court also concluded that Crown agents had acted disproportionately, considering the type of activity they were trying to control and the condition of the members of the Sturgeon Lake Band, who were charged with trafficking in fish, contrary to provisions of the *Fisheries Act* and regulations.

The judge ruled that there was not enough evidence to warrant a defence of entrapment. However, he granted the defendants an absolute discharge on all counts. Among his reasons for granting the absolute discharge were his findings that the effect of the government's operation was to deplete the stock in the lake that it was supposed to protect, that the Sturgeon Lake Band was largely dependant on welfare, that the monies involved were small and the needs of the vendors greater, and that he felt that there was a disproportion in sending a 'wired' undercover investigator to deal with unsophisticated people.

In both these cases the conduct of wildlife officers — Crown agents — was unquestionably in violation of the Crown's fiduciary obligations to the Aboriginal peoples involved.

R. v. Moise Dominique et al. and *R. v. Edmond Moar et al.*

In this action, the defendants, members of the Atikamekw and Montagnais First Nations, were charged with violations of Quebec hunting regulations. At the time, the Atikamekw and Montagnais First Nations were involved in comprehensive claims negotiations with the federal and provincial governments. Those negotiations had been under way for about 14 years.

Even before the defendants had given notice of their intention to raise their Aboriginal rights as a defence, they were informed by an official of the provincial secretariat for Aboriginal affairs that if they invoked their Aboriginal rights as a defence, the negotiations would be suspended, if not definitively terminated.⁷⁵ This threat, which would have effectively deprived the Aboriginal persons of the right to raise their fundamental rights in defence of a prosecution, was illegal and contrary to the principles of our justice system.

The threat was ultimately withdrawn by the provincial minister of Aboriginal after First Nations representatives brought pressure on the government to retract it.⁷⁶ Nevertheless, that the threat was made at all is disturbing; the fact that high-ranking government officials could adopt such a position demonstrates a complete lack of respect for the rights of Aboriginal peoples. It also highlights the incongruity of having the body with whom negotiations are conducted also in charge of prosecutions based on the exercise of the rights that are the subject of the negotiations.

Multiple charges for the same offence against members of a single Aboriginal community

There are numerous instances in which wildlife officers have laid multiple charges against several members of the same community for essentially the same offence — usually an alleged violation of hunting or fishing laws or regulations.⁷⁷ In these cases the community members have indicated their intent to defend against the charges on the basis of their Aboriginal and treaty rights. Nevertheless, the Crown has continued to charge people for the same offence.

Surely, once an issue of this sort is before the courts, it is appropriate to let the courts make a determination on the legal issues and to refrain from prosecuting other members of the same community — or indeed the same persons — unnecessarily for the same conduct. The mounting of a defence based on Aboriginal or treaty rights is expensive and often requires an Aboriginal community's entire financial resources — or more. The addition of an ever-growing number of further cases only exacerbates the burden.

Another option would be to consider staying all charges brought after it is indicated that a defence based on Aboriginal and/or treaty rights is being mounted.

Even when there is case law confirming the existence of Aboriginal or treaty rights, in many cases the Crown has continued to lay numerous charges based on a disregard for or narrow reading of the cases. Thus, in Manitoba, after the Manitoba Provincial Court determined that treaty rights prevailed over conflicting provisions of the *Migratory Birds Convention Act* in *R. v. Flett*,⁷⁸ the federal justice department recommended that wildlife officials continue to lay charges, as the decision was of a lower court. This position was maintained when the Manitoba Court of Queen's Bench upheld the decision at trial and was reversed only after the Manitoba Court of Appeal refused leave to appeal. Only at that point did the Crown drop numerous charges — between 25 to 30 — that were pending against members of at least four different First

Nations communities. This unjust situation would have been intensified if all or some of those pending cases had gone to trial.

Conclusion

Aboriginal peoples cannot be expected to have much confidence in a justice system in which they see accusations made and charges laid in an unfair manner. An insufficient level of understanding of Aboriginal society is demonstrated by the conduct of Crown agents in the cases cited in this section.

Conduct Subsequent to Litigation

Taking a case on Aboriginal or treaty rights through the courts is a costly and time-consuming venture. First Nations legitimately expect that their victories in the courts will translate into changes in government policies and positions. Unfortunately this is often not the case. Following victories by Aboriginal peoples in the courts, governments often take a protracted period to respond to the court's conclusions and, more often than not, seek to define narrowly the effect and extent of the judgement's application.

Eastmain Band v. Robinson

Legal proceedings were brought by the Eastmain Cree against the federal administrator appointed under the James Bay and Northern Quebec Agreement to obtain a mandamus ordering him to undertake a review of Hydro-Quebec's Eastmain hydro-electric project under section 22 of the agreement, as well as against several federal ministers to compel them to refer the project for public review under the federal Environmental Assessment Review (earp) Guidelines Order.

While the Crees were unsuccessful in their arguments under section 22 of the agreement, they did obtain a judgement from the Federal Court, Trial Division ordering the federal ministers to undertake the environmental assessment provided for under the earp Guidelines Order. The federal government appealed this judgement.

Notwithstanding the judgement of the Federal Court, almost four months after the judgement the minister of the environment could report only that representatives of the ministry concerned had met to discuss the matter.⁷⁹ The Crees sent letters and threatened further proceedings. Ultimately the government succumbed to pressure and began the review process.

Despite assurances made in the intervening months that it was nearing completion, it was not until almost eleven months after the judgement that an *initial assessment* was completed.⁸⁰

At the Federal Court of Appeal, the federal government was successful. Immediately its officials began to withdraw from impact assessments of various related projects, including assessments not covered specifically by the judgement. For example, within six days of the judgement the federal administrator sent a letter to the Crees desisting in its review of the Chibougamau-Némiscau Road.⁸¹

The federal government took almost four months to implement the terms of the judgement it had lost, but it took six days to implement the judgement it won. This double standard in execution of judgements is clearly contrary to its fiduciary duty to the Eastmain Crees.

R. v. Flett

Mr. Flett, a beneficiary of Treaty 5, was charged in 1985 with hunting two Canada geese in violation of the *Migratory Birds Convention Act*. He contended in the Manitoba Provincial Court that his treaty rights with regard to hunting were now entrenched by section 35(1) of the *Constitution Act, 1982* and thus prevailed over the statute. The court agreed and acquitted him.⁸² The Crown appealed the judgement to the Manitoba Court of Queen's Bench, where it was upheld in 1989.⁸³ Also in 1989 a similar judgement, concluding that treaty rights prevailed over inconsistent provisions of the *Migratory Birds Convention Act*, was rendered by the Alberta Court of Queen's Bench.⁸⁴ The Crown applied for leave to appeal the judgement in *Flett* to the Manitoba Court of Appeal, which refused leave, upholding the conclusion of the lower court.⁸⁵

Between the date of judgement of the Provincial Court, 14 May 1987, and that of the Court of Appeal, in September 1990, the Crown continued to enforce the provisions of the *Migratory Birds Convention Act* in Manitoba, notwithstanding the judgements of the courts.

This conduct was explained by an enforcement co-ordinator of the Canadian Wildlife Service, during the hearings of the Public Inquiry into the Administration of Justice and Aboriginal People in Manitoba, who told the commissioners that

it was recommended by the Department of Justice that [*Flett*] only being a provincial court decision, nobody is bound by it and they suggest that we continue [to lay charges].⁸⁶

In its report, the commission roundly criticized the position taken by the federal government. As the commissioners noted,

No stay was sought by the Crown or ordered by any court. The government was simply flouting the law as it had no authority whatsoever to ignore this decision. ... It brings dishonour to the government and the Crown when court decisions are not respected solely because the government has lost the case and has launched an appeal. Continuing to prosecute Indians on the same basis that had been rejected by Judge Martin after the trial decision in *Flett* imposed great hardship on those charged, and brought the government as well as the legal system in Manitoba into disrepute. This cannot be justified and should never be repeated.⁸⁷

Simon v. The Queen

The defendant, a member of the Mi'kmaq Nation from Shubenacadie, was charged with violating Nova Scotia hunting regulations. In his defence, he invoked his treaty right to hunt under the Treaty of 1752. The case went to the Supreme Court of Canada, where the defendant was ultimately successful in his claim.⁸⁸ The judgement is one of the leading cases in Canada on treaty rights, cited often by parties and courts. The Supreme Court of Canada held that:

The Treaty was entered into for the benefit of both the British Crown and the Micmac people, to maintain peace and order as well as to recognize and confirm the existing hunting and fishing rights of the Micmac. ...the Treaty of 1752 was validly created by competent parties.⁸⁹

With respect to the Crown's argument that the treaty had been terminated after its signing because of subsequent hostilities, the Court held that

Once it has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying termination. The inconclusive and conflicting evidence presented by the parties makes it impossible for this Court to say with any certainty what happened on the eastern coast of Nova Scotia 233 years ago. As a result, the Court is unable to resolve this historical question. The Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities.⁹⁰

The Court also noted that there was nothing in the British conduct after the treaty was signed to indicate that the Crown considered the terms of the treaty at an end.

The judgement of the Supreme Court of Canada was rendered on 21 November 1985. Since then members of the Mi'kmaq Nation and organizations representing it have been attempting, with little success, to engage the federal and provincial governments in dialogue concerning the effect of this judgement (and the *Guerin* judgement) on their rights.

This has not been because of a lack of effort on the part of Mi'kmaq representatives. Repeated representations were made to government officials and representatives about the need for discussions and new government policies on the basis of Supreme Court jurisprudence. For instance, on 21 January 1987, Viola Robinson, president of the Native Council of Nova Scotia, spoke at the federal-provincial meeting of ministers on Aboriginal constitutional matters. At that meeting she spoke about the Treaty of 1752 and the judgment in *Simon*:

Yet, even after the highest court of the land, in a unanimous decision, confirms the validity of the treaty, the Micmac, to this date, have not been afforded the opportunity by neither the federal government, the Crown, protector of our treaties, nor the Government of Nova Scotia, to first issue a statement that indeed the treaty exists as with the Micmac and, second, to begin a bilateral or trilateral process of treaty reconciliation with the Micmac people.⁹¹

The entrenchment of section 35 of the *Constitution Act, 1982* added further support for the position of the Mi'kmaq Nation that the government was under an obligation to consult and negotiate with them on the subject of the Treaty of 1752.⁹² We also note that the Treaty of 1752 is not the only treaty that protects the Aboriginal rights of the Mi'kmaq. A number of other treaties exist; the Mi'kmaq refer to them as the Mi'kmaq Covenant Chain of Treaties. These treaties protect the rights of the Mi'kmaq in mainland Nova Scotia, Cape Breton, New Brunswick, Prince Edward Island, Newfoundland and eastern Quebec. Not all of these treaties have been the subject of judicial decisions. However, judgements of the New Brunswick Court of Appeal in 1980 and the Nova Scotia Provincial Court in 1987, pertaining to some of those treaties, held that they provided treaty protection to the harvesting rights of the Mi'kmaq.⁹³

On 1 October 1986 (Mi'kmaq Treaty Day) the Mi'kmaq Nation promulgated Interim Hunting Guidelines that incorporated their position on jurisdiction over and regulation of their rights.⁹⁴ Neither the federal nor the provincial governments responded to this initiative. On 8

June 1987 the Union of Nova Scotia Indians made a submission to the Aboriginal affairs committee of the Nova Scotia cabinet in which they deplored the fact that

The Government of Nova Scotia has had the benefit of the *Simon* case since November of 1985 and of the Micmac position as contained in the Interim Hunting Guidelines since October 1986. To date the Micmac have not had the benefit of the Government's position.⁹⁵

At that meeting a provincial representative stated that the province had chosen deliberately not to take a stand so that negotiations could commence without prejudice. It is difficult, to say the least, to enter into negotiations with a party that refuses to publicize its initial position; such an attitude toward negotiations makes it very hard for the Aboriginal parties to know the case they are ostensibly supposed to meet.

During a meeting between federal representatives and representatives of the Union of Nova Scotia Indians, the Grand Council of Micmacs and the Native Council of Nova Scotia on 17 September 1987, almost two years after the judgement was released, it was apparent that officials of the federal justice and Indian affairs departments had not made any real effort to reassess Mi'kmaq claims in Nova Scotia on the basis of this judgement (and the judgement of the Supreme Court in *Guerin*). The federal government had intervened in the *Simon* case in the Supreme Court and had argued in favour of Mi'kmaq treaty rights in that case.

At a meeting of the cabinet committee on Aboriginal affairs on 30 September 1987, the Nova Scotia government reiterated its position (or lack of position) on the Treaty of 1752.⁹⁶ One of the Mi'kmaq chiefs requested that, as a measure of good will, and taking into account the Interim Hunting Guidelines, there be a moratorium on prosecutions of Mi'kmaqs on hunting-related charges until an agreement could be struck. The government refused, on the grounds that there could be abuses. This position was maintained even though the government was assured that the chiefs would not permit any abuse and that the interim guidelines themselves took into account the need to prevent abuses.

On 5 November 1987 a draft Interim Hunting Agreement was forwarded to Mi'kmaq representatives from the Nova Scotia government. As it asserted the supremacy of provincial wildlife law over rights exercised pursuant to Mi'kmaq treaty rights, it was judged unacceptable. Nevertheless, the Union of Nova Scotia Indians was prepared to adopt the safety measures proposed in it, without references to the provincial laws.

The dispute culminated in the autumn of 1988 when the province announced plans for a moose hunting licence draw for a hunt to take place in October in Cape Breton. The 200 individuals who would receive licences were selected in July by a lottery-type draw. No specific provision was made for the Mi'kmaq living in the province; notwithstanding the *Simon* decision, the existence of a series of treaties protecting their rights and the entrenchment of section 35 of the *Constitution Act, 1982*, they were expected to participate in the lottery on the same basis as non-Aboriginal persons.⁹⁷

The Mi'kmaq reacted to the province's refusal to respect their treaty rights by organizing their own moose harvest during the month of September. Mi'kmaq hunters were advised to follow the Interim Hunting Guidelines, and all Mi'kmaq hunters were required to hold a firearms safety certificate before a permit would be issued. The government condemned the Mi'kmaq moose hunt, insisting that "anyone hunting moose in Cape Breton, out of season and without a licence legally issued by the Department of Lands and Forests, will be in violation of the Nova Scotia Wildlife Act and Regulations and subject to prosecution".⁹⁸

Following the province's threats to prosecute, the Union of Nova Scotia Indians (unsi) wrote to Bill McKnight, federal minister of Indian affairs, to request that he take action, in his capacity as fiduciary, to stop the province's interference with Mi'kmaq treaty rights.⁹⁹ The federal government, which had supported the Mi'kmaq claims in the *Simon* case, responded on 28 November 1988, offering a restrictive interpretation of the scope of the judgement in *Simon* and declining any involvement other than participating in negotiations with the Mi'kmaq and the province to clarify Aboriginal hunting rights in Nova Scotia. A further letter from Alex Christmas, president of unsi, dated 31 October 1988, requesting financial and technical assistance from the federal government for these cases, was answered by the minister in January 1988: he refused financial assistance and referred the Mi'kmaq to the basic services and resources available from the department's Treaties and Historical Research Centre.¹⁰⁰

Fourteen Mi'kmaq hunters were charged with various offences under provincial wildlife laws and regulations following the Mi'kmaq moose hunt. The Crown communicated to the Union of Nova Scotia Indians its intention to argue not only that the Treaty of 1752 was limited in geographical scope and did not apply to the activities in question, but also that the treaty had been terminated by subsequent hostilities. This last argument had been made before the Supreme Court of Canada in *Simon*. At that time, the court ruled that the evidence on this issue was

inconsistent and conflicting and that the Crown had failed to prove that the Treaty of 1752 was terminated by subsequent hostilities.¹⁰¹ The attorney general of Nova Scotia now claimed that new 'evidence' had been discovered that demonstrated termination of the treaty.¹⁰²

The attorney general sought to invoke this evidence in another hunting trial that went to court a few months before the moose hunting cases. In *R. v. Dorey* the defendant was acquitted because the Crown could not prove him to be in possession of the carcass. However, the Crown presented written arguments on why the judgement of the Supreme Court of Canada in *Simon* could not be considered *res judicata* on the issue of the validity of the Treaty of 1752. The province argued that the decision in *Simon* stood merely for the *presumption* that the Treaty of 1752 was valid. It pointed to the fact that the court had ruled that the province had not met its burden of proof in establishing that the treaty had been extinguished in support of this allegation.¹⁰³

Since the burden of proof is always on the Crown to prove extinguishment of Aboriginal or treaty rights,¹⁰⁴ it cannot be argued that any time the Crown fails to meet its burden of proof and a court rules that there is an existing Aboriginal or treaty right, this conclusion has only the force of a presumption. Yet this is the logical extension of the assertions of the province of Nova Scotia in the *Dorey* case.

The Crown proposed a lengthy trial in the moose hunting cases. All requests for financial assistance were refused. During the trial, counsel for the Mi'kmaq wrote a letter to counsel for the attorney general complaining about the conduct of the Crown during the trial. According to counsel for the Mi'kmaq, certain actions of Crown counsel in relation to expert witnesses and Mi'kmaq participants demonstrated racial insensitivity.¹⁰⁵ For instance, Crown counsel had requested that all Mi'kmaq be excluded from the courtroom during the testimony of an expert witness for the defence, while non-Mi'kmaq were free to stay; had suggested that Mi'kmaq myths were "only stories"; and had questioned the defence's expert witness about a passage in a book concerning "drunkenness among the Indians", questions that the defence felt were totally irrelevant and insulting.

After many weeks of trial, but before the trial was completed, the Nova Scotia Court of Appeal released its judgement in *R. v. Denny, Paul and Sylliboy*,¹⁰⁶ ruling that three Mi'kmaq fishermen had an Aboriginal right to fish in Nova Scotia waters that had not been extinguished by treaty or legislation, that the fisheries legislation did not give priority to the needs of the

Mi'kmaq, and that they thus had limited immunity from prosecution under federal fisheries laws to the extent that those laws interfered with their Aboriginal rights. The court did not find it necessary to rule on the issue of treaty rights given its conclusions on Aboriginal rights.

Counsel for the Mi'kmaq in the moose hunting cases made a motion for a verdict of acquittal for the accused on the basis of the *Denny* decision. The Crown took the position that the judgement in *Denny* created a presumption of Aboriginal hunting rights that had not been rebutted by evidence led by the Crown in the moose hunting cases and thus did not oppose the motion for dismissal.

A debt of more than \$200,000 was incurred by Mi'kmaq organizations in defending the persons charged in the moose hunting cases. Given the circumstances of the case, the Mi'kmaq organizations reiterated their request that the provincial attorney general's office cover the legal fees incurred during the moose hunting trial. The Crown refused.¹⁰⁷ After further exchanges of letters and meetings on this subject, the Crown agreed to pay the legal fees incurred by the Native Council of Nova Scotia and the Union of Nova Scotia Indians in defending the moose hunting charges.

In the meantime, in October 1989, the Nova Scotia government and the leaders of the Mi'kmaq groups in the province signed interim, without prejudice, conservation agreements for hunting and trapping activities.

For purposes of our study, two principal considerations arise from the conduct of the federal and provincial Crowns in Nova Scotia after the *Simon* judgement. First, how should governments react to judgements favourable to First Nations? Were the reactions in this instance appropriate? Second, what obligation is there, on the part of governments, to accept judicial pronouncements on the existence of treaty or Aboriginal rights?

We propose that judgements favourable to First Nations should be given a wide and liberal interpretation by governments. Government policies and positions on First Nations' claims should be reviewed constantly and subject to changes in the law.¹⁰⁸ We also maintain that governments should hesitate to retry issues that have been resolved in favour of Aboriginal peoples. While this may suggest a double standard on our part, we believe that there is ample justification for our position.

First, there is the inequality in the positions of governments and Aboriginal peoples. As pointed out in the introduction to this study, Aboriginal peoples have been virtually shut out of

the Canadian justice system for over a century, and much of the jurisprudence that affects their claims, beginning in Canada with the *St. Catherine's Milling* case, was determined without the participation of First Nations. From 1927 until 1951, the *Indian Act* prohibited anyone from raising money to finance Indian claims.¹⁰⁹

The result is that a jurisprudential foundation was laid without the Aboriginal peoples of Canada having the opportunity to defend and advocate their legal position before the courts.

We also believe that the Crown acted contrary to its fiduciary duty by ignoring the implications of the judgement in *Simon* and not revising its policies with respect to Mi'kmaq rights on the basis of that judgement. It is not only courts that must apply standards of large and liberal interpretation to First Nations' treaty rights. The protection extended to Aboriginal and treaty rights through the fiduciary duty and section 35 of the *Constitution Act, 1982* not only mandates the courts to review Crown conduct but also requires governments and legislatures to review their own conduct with respect to the rights of First Nations.¹¹⁰

Professor Slattery has pointed out, in the context of the Charter, that the proper functioning of the Charter depends less on the activities of those policing others (such as the courts) than on the activities of those who are obliged directly to act, or to refrain from acting, in a certain way. Those who are bound directly are obliged to assess the reasonableness of their own anticipated actions in light of the guarantees of the Charter and to act accordingly.¹¹¹

This reasoning is also applicable to rights enshrined in Part II of the *Constitution Act, 1982*. The recognition and affirmation of Aboriginal and treaty rights depend not only on the policing of government activities by the courts, but also on governments' own assessment and correction of their behaviour.

R. v. Sparrow and 'Superseded by Law'

When the Supreme Court of Canada rendered its judgement in *R. v. Sparrow* in 1990 it was hailed by many Aboriginal people as a victory. In that judgement the court established guidelines for interpreting the constitutional protection of Aboriginal and treaty rights.

The court also ended a controversy about how and when Aboriginal rights could be extinguished. Before *Sparrow* the only judgement on the extinguishment of Aboriginal rights was *Calder v. A.G.B.C.*¹¹² In the *Calder* judgement, the members of the Supreme Court divided 3/3 on the question of how and when Aboriginal rights could be extinguished. Mr. Justice Judson, writing for himself and two other judges, concluded that Aboriginal rights could be extinguished by a series of statutes that evinced a unity of intention to exercise a sovereignty inconsistent with Aboriginal rights.¹¹³ Mr. Justice Hall, writing for himself and two other members of the Court, concluded that the onus of proving that the Crown intended to extinguish Aboriginal rights lies in the Crown and that the intention to extinguish those rights must be clear and plain.¹¹⁴

In *Sparrow*, after examining both approaches to extinguishment, the Supreme Court unanimously adopted the one proposed by Hall in *Calder*.¹¹⁵ Thus it is clear that, at least post-*Sparrow*, it can no longer be argued that Aboriginal rights can be extinguished by mere inconsistency with a statute or regulation. In response to Canada's arguments that Aboriginal fishing rights had been extinguished by regulation, the court stated that

At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.¹¹⁶

One would have expected this clarification from the Supreme Court to result in a change in federal policy on extinguishment. However, this does not appear to be the case.

The concept of 'supersession by law' is one of several factors the federal government has considered in the review of comprehensive land claims submissions. As discussed earlier, submission of a claim under the comprehensive land claims process is the only option, other than the courts, open to First Nations seeking resolution of their claims based on Aboriginal title. Supersession by law has been defined by a federal official as including

legislation by the federal government directly or indirectly extinguishing or circumscribing aboriginal rights. It also includes valid provincial legislation and acts of the provincial governments, such as patents of land, resource regulation and restrictions on hunting, fishing or other aboriginal activities which have the effect of restricting or extinguishing such aboriginal rights. This interpretation derives from the Judson thesis in the *Calder* case. While this issue has not been conclusively determined by the Supreme Court of Canada, subsequent decisions have tended to support the validity of legislation imposing this type of restriction.¹¹⁷

Now that the Supreme Court had determined this issue conclusively — and contrary to the 'Judson thesis' and the position adopted in this definition of supersession by law, one might expect the federal government to have revised the concept of supersession by law, which is part of a policy that has a tremendous limiting effect on First Nations' claims. However, as of the time of the completion of this paper, the federal government still considered supersession by law as a factor in reviewing comprehensive claims.¹¹⁸

According to an official of the Comprehensive Claims Branch, the *Sparrow* decision is taken into account, but the policy of supersession by law itself has not changed. Thus claims that the federal government believes have been superseded by legislation are not negotiated. Legal analyses of the *Sparrow* decision and directives issued pursuant to it have been circulated in the department. However, when asked whether the policy had been changed by a public or internal policy document on the *Sparrow* decision, the official said that to the best of her knowledge it had not.

How can the federal government continue to rely on supersession by law and the Judson thesis in refusing to negotiate a comprehensive claim when that thesis has been rejected by the Supreme Court of Canada? First Nations have a right to expect that favourable judgements from the courts, and especially the Supreme Court of Canada, will result in the revision of federal policy that is inconsistent with those judgements. It is a violation of the Crown's fiduciary duty to neglect to engage in this revision.

Williams v. The Queen

In the *Williams* case it appears that the federal government was relatively efficient in revising its policy as a result of a decision of the Supreme Court of Canada.¹¹⁹

This case dealt principally with the taxation of unemployment insurance benefits received by members of First Nations registered under the *Indian Act*. The legal issue that the Supreme Court had to resolve, to determine whether the exemption from taxation under section 87 of the *Indian Act* applied, was the *situs* of the unemployment insurance benefits.

The court held that the benefits in question were tax-exempt because the qualifying employment was clearly located on-reserve. The court stated that, "With regard to the unemployment insurance benefits received by the appellant, a particularly important factor is the location of the employment which gave rise to the qualification for the benefits." The court rejected the use of the conflict of laws rule, which deems the *situs* of a debt to be at the residence of the debtor. The court widened the test to include consideration of connecting factors that would serve to connect the income of an Indian to the reserve.

The court held that the rule that the residence of the debtor exclusively determined whether unemployment benefits qualified for an exemption under section 87 of the *Indian Act* would also have to be re-examined in light of its determination that such a conclusion could not safely be drawn from the principles of conflict of laws. However the court concluded that this case would not be an appropriate case in which to develop a test for the *situs* of employment income. It is clear that the issue the court thought should be re-examined was not the relevance of the residence of the debtor but, rather, the use of the conflict of laws rule to determine tax exemption under section 87 of the *Indian Act*. Earlier the court stated that "It may be that the residence of the debtor remains an important factor, or even the exclusive one. However, this conclusion cannot be directly drawn from an analysis of how the conflict of laws deals with such an issue."

Despite the Supreme Court's caution that *Williams* was not an appropriate case on which to base rules about the *situs* of employment income, Revenue Canada revised its application of *Indian Act* tax exemptions in December 1992, eight months after the *Williams* judgement was rendered. Basing itself on the *Williams* decision, Revenue Canada stipulated that, as of 1 January

1994, "the salary of an Indian will no longer be exempt merely because it is paid by an employer situated on a reserve. The principal factor will now be where the duties are carried out."¹²⁰ No consultation with organizations representing Aboriginal peoples preceded this determination.

Revenue Canada's interpretation did not take into account a September 1992 decision of the Tax Court in *McNab*¹²¹ that held that employment income was tax-exempt under section 87 of the *Indian Act*, despite the fact that the Court found that the recipient's work location was in Regina and not on-reserve.

The policy alteration in this case was clearly to the benefit of the government of Canada. It appears that the government can act relatively expeditiously in changing policy relating to First Nations on the basis of judgements from the Supreme Court of Canada when it is in its interests to do so.

Departmental Responsibility under the *Indian Act* Pursuant to Court Decisions

Another area where the government has been reluctant to implement judgements from a court is with respect to government responsibility for allocating subsidies under Indian Affairs social programs.

In February 1990 the Canadian Human Rights Tribunal ruled that the department of Indian affairs had the power, indeed the sole power, with respect to the provision of education services to Indians under the *Indian Act*.¹²² In this case (*Courtois*), the band council had for two years suspended the provision of education services to children of women reinstated under section 11(2) of the *Indian Act*. Children of men who had married non-Indian women before 1985 were provided with on-reserve education.

One of those women complained, by letter, to the department of Indian affairs about the council's decision to refuse her daughter admission to the band-controlled school. The department did not effectively respond to the complaint and took no measures to fund on-reserve education for the children of reinstated women. A complaint was therefore filed with the Canadian Human Rights Commission.

In its judgement against the department of Indian affairs, the tribunal concluded that, under the *Indian Act*, the provision of education services is vested expressly in the department of Indian affairs. Thus, contrary to the department's contentions, the department is the supplier of

educational services, not the band council, despite the fact that administration of the education program had been transferred to the band council.

Recently a woman who was refused post-secondary educational subsidies by the band council, apparently for political reasons, appealed to the department of Indian affairs for help. Department officials, who had been involved in the *Courtois* case, refused to help on the grounds of non-interference with the band council's administration. This refusal came despite the decision of the Canadian Human Rights Tribunal in *Courtois*. In this case, it appears that the department failed to educate its bureaucrats and decided to ignore the Tribunal's decision and to defy the law by continuing to deny responsibility where the administration of a program has been transferred to a band council.

Native Women's Association of Canada v. Canada

In this case the Native Women's Association of Canada (nwac) took proceedings against the federal government, alleging that the government had discriminated against it and violated its right to equality and freedom of speech by funding and enabling the participation of four other First Nations associations in discussions about amendments to Parts I and II of the *Constitution Act, 1982* while not funding or enabling the participation of nwac.

Nwac lost at trial but was partially successful on appeal: the Federal Court of Appeal ruled that the federal government had violated nwac's rights under sections 2(b) and 28 of the Charter. The judgement was rendered on 20 August 1992. As a result of this judgement, nwac attended the next constitutional conference in Charlottetown expecting to be able to participate in the discussions on the same basis as the other First Nations associations. However, despite the ruling of the Federal Court of Appeal that the denial of participation was a breach of the *Canadian Charter of Rights and Freedoms*, the federal government had made no provisions for participation by nwac at these discussions and refused to allow their representatives to attend the conference.

Conclusion

There appears to be no governmental process in place for routine revision of all laws and policy that apply to Aboriginal peoples on the basis of judgements from the courts. The cases cited in

this section demonstrate that such revision is haphazard and often done only at the instigation of Aboriginal peoples or when such revision is to the benefit of the government.

Comparative Models: The Experience of the U.S. Bureau of Indian Affairs

Canadian law on Aboriginal rights has much in common with American law on Native rights. The early u.s. cases of *Johnson v. M'Intosh* and *Worcester v. Georgia* have had a major influence on the development of Canadian Aboriginal law. The fiduciary duty is also an important part of American Aboriginal law, where it is often referred to as the 'trust responsibility'.¹²³

As in Canada, in the United States the federal government has primary responsibility with respect to the rights of First Nations. In the United States the Bureau of Indian Affairs (bia) is the principal instrument for carrying out the federal trust responsibility. While the most substantial activities of the bia are the provision of education and the management of tribal resources, particularly lands, including mineral and water rights, the Bureau frequently represents Aboriginal interests (tribal and individual) against states and other entities in the American courts.¹²⁴ Thus, the federal government plays a major role in actively advocating and advancing the rights of Native Americans in the courts.

In Canada, however, the federal government intervenes most often on the side of the provinces in actions brought by or against First Nations and rarely sides with Aboriginal peoples in court.

In one case where the federal government sided with the Aboriginal litigants, *Simon v. The Queen*, the federal government took no position on whether the Treaty of 1752 had been terminated by subsequent hostilities, and although it argued that the treaty was a treaty for purposes of section 88 of the *Indian Act* and section 35(1) of the *Constitution Act, 1982*, it insisted that provincial regulations apply to the Aboriginal defendant despite the existence of a treaty right — hardly a ringing endorsement of the Mi'kmaq position.¹²⁵

In another case, *Municipalité d'Oka v. Jean-Roch Simon*,¹²⁶ the issue was whether municipal by-laws apply to lands occupied by Aboriginal persons. While the Crown supported the Aboriginal litigants in their position that these by-laws did not apply, it has refused to argue that the lands are lands contemplated by section 91(24) of the *Constitution Act, 1867* ("Lands reserved for the Indians"), preferring to argue that the lands are federal public lands under section 91(1A). Once again we see the federal Crown defending its constitutional position

relative to provincial jurisdiction but refusing to take an explicit position in defence of Aboriginal interests.

In the United States, the federal government has brought actions against the states on several important issues of Aboriginal and treaty rights, including cases against the state of Washington on the treaty right to fish and on the basis of Aboriginal title to the bed of a river.¹²⁷ It brings such actions on its own behalf as well as on behalf of Aboriginal peoples in order to fulfil its trust obligations.¹²⁸ In such cases the Bureau of Indian Affairs acts through the federal Department of Justice.

In instances where the federal government has been unwilling to take action on behalf of a tribe, the courts occasionally have been willing to review such administrative action and to order the commencement of a possessory action on the theory that the federal trusteeship over Indian lands created by the statutory restraints on alienation imposes affirmative obligations to protect Indian possessory rights. For instance, in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, the court reviewed the decision of the attorney general of the United States in refusing to institute suit on behalf of an Indian tribe, stating that

Moreover, in *Oneida Nation*, the Court made clear that by virtue of the fiduciary duty imposed by the non-intercourse Act, the United States has an obligation to do whatever is necessary to protect Indian land when it becomes aware that Indian rights have been violated, even though the United States did not participate in the unconscionable transaction.¹²⁹

The court declared that the United States had a trust relationship with the Passamaquoddy and that the United States could not deny the Passamaquoddy Tribe's request for litigation on their behalf on the sole ground that there was no trust relationship between the United States and the Tribe.

The role of the federal government in litigation against the states has become more important following a recent decision from the U.S. Supreme Court, ruling that a tribe cannot sue a state for money damages because the state enjoys sovereign immunity from suit.¹³⁰ The federal government can sue a state for money damages on behalf of a tribe, because sovereign immunity will not protect a state from suit by the federal government. Thus the federal government has intervened, for instance, on the side of the Cayuga First Nation in its suit against the state of New York.¹³¹

Failure of the Bureau to Fulfil its Trust Obligation

The bia has come under frequent criticism for its mismanagement of trust resources and violation of its trust responsibility to tribes and individual Indian persons.¹³² Tribes have often criticized the Bureau for its conduct. The bia has been accused of not doing its job and of being more sensitive to non-Aboriginal than to Aboriginal interests. The courts have criticized the conduct of the Bureau on more than one occasion.¹³³ In *Scholder* the Court of Appeals criticized the bia for its failure to provide irrigation for Indian farmers while providing it for non-Indians, stating that

We feel obliged to add that the Bureau's conduct, as reflected by the record before us, borders on the shocking. At best it reflects gross insensitivity. The United States has a high moral obligation to the American Indian, and Congress has entrusted the officials of the Bureau of Indian Affairs with the responsibility of meeting that obligation. We have no doubt that the Bureau failed to meet its responsibility in the instant case. ...it is hardly surprising that the Bureau's actions have inspired a lawsuit. Its officials should find no satisfaction in our conclusion that, after two years of costly litigation, sovereign immunity shields their decision from judicial scrutiny.¹³⁴

The problem faced by the bia is actually quite similar to that faced by the Canadian department of Indian affairs. Both have a responsibility to defend the interests of First Nations when they are threatened by other interests on the basis of the fiduciary obligations owed to them by the government. However, many of these threats come from other agencies within the government. Canby points out that

The trust relationship runs into even more severe problems when the battle for preservation of trust assets becomes a legal one. The Bureau of Indian Affairs is represented initially by the Solicitor of the Department of the Interior and, if the matter goes to court, by the Department of Justice. Both of these offices are charged with representing not only Indian interests, but also those of the agencies with which the tribes frequently come into conflict... A private attorney could not ethically undertake the representation of such clearly competing clients, but the government attorneys regularly do.¹³⁵

In *Pyramid Lake Paiute Tribe v. Morton* the Federal District Court overturned a water allocation that the secretary of the interior had made as an 'accommodation' without adequate attention to the trust responsibility:

[W]hile the Secretary's good faith is not in question, his approach to the difficult problem confronting him misconceived the legal requirements that should have governed his action. A "judgment call" was simply not legally permissible. The Secretary's duty was not to determine a basis for allocating water between the District and the Tribe in a manner that hopefully everyone could live with for the year ahead. This suit was pending and the Tribe had asserted well-founded rights. The burden rested on the Secretary to justify any diversion of water from the Tribe with precision. It was not his function to attempt an accommodation.¹³⁶

However, a later judgement from the U.S. Supreme Court held that the government cannot always follow the "fastidious standards of a private fiduciary" when officials are delegated competing responsibilities for Aboriginal tribes and other interests.¹³⁷

In that case (*Nevada*), the u.s. government filed an action on behalf of the Pyramid Lake Paiute Tribe to claim water rights in the Truckee River. A previous case before the District Court, which had resulted in a settlement between land owners and the United States on behalf of the tribe, had apportioned a certain amount of water from the river to the tribe. The United States now sought additional water rights for the tribe, relying on its obligation to the tribe by virtue of its fiduciary duty. The Supreme Court ruled that the United States was prevented from litigating the present claim on the basis of *res judicata*, since the settlement of the previous claim had resolved the issues. While the Court recognized "the distinctive obligation of trust incumbent upon the Government in its dealings with Indian tribes", it held that in this instance the government also had a responsibility for the reclamation of arid lands under the *Reclamation Act*.

The reluctance of the Court to overrule the previous settlement, even at the behest of the government itself, is disquieting.¹³⁸ This reluctance emphasizes the need for a government whose duty it is to represent the interests of First Nations to do so effectively and responsibly.

This judgement indicates that u.s. courts may be reluctant to overturn an executive decision in favour of non-Aboriginal persons, even if that decision is not in conformity with the trust obligation. This situation highlights the need to avoid the creation of conditions where such conflicts of interest are produced or arise.

One important area in which the federal government's conflict of interest has severely prejudiced the tribes is water rights. The United States has failed to develop, secure and protect adequate water supplies for many Indian tribes. Since Congress and the Justice department have a responsibility to advance, at the same time, the national interest in water and the interests of Aboriginal peoples, these competing claims are often resolved against the tribes.¹³⁹

Solutions Proposed

In an attempt to resolve this conflict several solutions have been proposed. In 1973, President Nixon proposed establishment of an independent Indian Trust Counsel Authority to undertake legal representation of Indian trust interests.¹⁴⁰ In the Nixon proposal, the trust counsel would have had the authority to bring suit against federal agencies as well as states and private parties in the name of the United States as trustee. In explaining the rationale for creating an independent counsel, President Nixon stated,

The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney-General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the government holds as trustee.

Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfil this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal Government is damaged whenever it appears that such a conflict of interest exists.¹⁴¹

In 1977, the American Indian Policy Review Commission went even further than the Nixon proposal and recommended a cabinet-level department of Indian affairs with its own office of trust rights protection to litigate trust cases.

In 1990 a bill introduced in the Senate (but not passed) would have created a trust counsel for Indian assets in the department of the interior. The trust counsel was to be charged with creating standards to guide federal agencies in trust questions and providing an independent

administrative review of all federal agency actions that affect Indian trust assets. Although the trust counsel would not have been empowered to bring suit in the name of the United States, the trust counsel would have had the power to investigate complaints that any government agency had violated or planned to conduct an activity that would violate the government's obligation to protect trust assets.¹⁴²

Summary and Recommendations

The Canadian cases and conduct summarized in this paper indicate that there are substantial systemic problems facing Aboriginal peoples in trying to establish their rights. It is evident that the Crown's priorities in litigation with Aboriginal peoples have almost always been opposed to the interests of First Nations. Past denials of First Nations' rights and insufficient understanding of the nature of Aboriginal and treaty rights, are evident in the early cases, have created a situation where the status quo tends to favour government. Moreover, it is obvious that in comparison to the Crown, First Nations lack the financial resources and influence to level the playing field.

In light of our findings, we make the following recommendations to remedy the deficiencies of the present system.

1. Give First Nations organizations the same rights with respect to interventions in cases involving their rights as are now enjoyed by the provinces and the federal government

At present the federal attorney general and the attorney general of each province are entitled to intervene as of right before the Supreme Court of Canada in all cases involving constitutional questions.¹⁴³ They also receive notice when such constitutional questions are stated. Similar provisions in the various acts governing the procedures of the provincial courts of appeal and superior courts ensure that attorneys general receive notice when the constitutionality of provincial or federal acts is at stake and allow them to intervene as of right in those cases.¹⁴⁴

It would be appropriate for these same acts to create a right for First Nations representatives or organizations to receive notice of constitutional questions involving Aboriginal or treaty rights and to have a concomitant right to intervene in these cases. The attorneys general should adopt a policy of supporting interventions by First Nations representatives, even at trial.

2. *Create a separate government department charged solely with fulfilling the fiduciary obligations owed by the federal government to First Nations*

We find the Nixon proposal, outlined earlier in the paper, a very interesting attempt to rectify the conflict of interest situation that presents itself under current rules. The federal government should create a department or agency with a mandate to advance the interests of First Nations. It goes without saying that such a department or agency should be created and staffed through consultations with First Nations. This body would then be entrusted with the legal representation of First Nations' fiduciary interests; such representation might involve litigation against provinces, other federal departments or even third parties. This body should be independent of the department of justice.

3. *Establish a national case management system*

The body referred to in recommendation 2 should also have the authority to establish a national case management system to identify legal issues requiring clarification by the courts as well as issues already before the courts that would be of interest to First Nations. This information would be shared with First Nations and would enable them to identify appropriate test cases. The federal government currently has the advantage of being able to gather and process such information, which it can then use to its advantage.

4. *Establish an independent fact-finding body to resolve Aboriginal claims*

Cases based on Aboriginal or treaty rights, including those involving assertions to title or jurisdiction, are lengthy and involve a great deal of anthropological, historical, archaeological and sociological evidence. Often, trial judges hearing these cases have little experience with the 'novel' issues being raised, and at times this results in a favouring of the status quo. The history of the British, French and Canadian actors and their perspective on the historical background of these claims is well known and understandable to a judge; the history and perspective of the Aboriginal peoples are less so.

It would be beneficial for Aboriginal peoples asserting Aboriginal or treaty rights or claims regarding Crown actions to present their case to a fact finder with some experience in the domain. We therefore recommend that the government of Canada consider establishing an

independent tribunal with jurisdiction over Aboriginal assertions and claims at the trial level. Each of the provinces should also set up such a tribunal to hear cases concerning the effect of provincial laws. These specialized tribunals would be subject to the supervising powers of the superior courts, and appeals from a tribunal decision could be brought to the courts of appeal and the Supreme Court.

The principle behind such tribunals is the same as that prompting the creation of specialized labour tribunals in Canada. Tribunals of this type afford the opportunity for claimants to have their cases heard and judged by persons with some background in the matters at issue. Moreover, such tribunals have wide discretionary powers on issues such as the admissibility of evidence and, perhaps most important, remedies. An administrative tribunal typically has powers to order innovative and broad remedies, fashioned to meet the particular requirements of the case before it.¹⁴⁵

A tribunal hearing matters pertaining to Aboriginal and treaty rights could, for instance, order that the parties to an action enter into a treaty process; it could order a temporary or permanent moratorium on development in a certain area should circumstances warrant; it could retain supervisory jurisdiction in complicated cases.

Judges of such tribunals should be chosen in consultation with First Nations and should have some background and understanding of Aboriginal cultures and history. This would ensure that, while questions of law would be determined ultimately by the Supreme Court of Canada, important questions of fact would be determined by a specialized tribunal with experience with the issues. The staff of the tribunal should include trained anthropologists and ethnologists, who should also be appointed in consultation with First Nations.

In creating the tribunal, it would be important to examine the experience of the United States with its Indian Claims Commission. This special tribunal was set up by statute in 1946, for a limited period, to hear suits brought by tribes, bands or other identifiable groups of Indians against the United States. The Indian Claims Commission judged the original claim, and appeals were heard by the Court of Claims and by *certiorari* to the U.S. Supreme Court.

The claims commission had jurisdiction to hear claims in law or equity and "claims that would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity", claims

arising out of the taking of lands without compensation agreed to by the claimant, and "claims based upon fair and honourable dealings that are not recognized by any existing rule of law or equity".¹⁴⁶

Claims before the commission were not barred by laches or statutes of limitation. Although, by its statute, the commission had an independent investigative function, it did not exercise that role, and it was criticized for failing to do so.¹⁴⁷

Despite its potential, the commission was not a success for Native American claimants. There were several reasons for this.¹⁴⁸ Because the commission's limited interpretation of its mandate, the only remedy it would order was money damages, thus promoting the idea that Native land claims litigation could result only in an exchange of Native title for financial compensation.¹⁴⁹ A financial award is a poor substitute for recognition of Aboriginal land rights. This title-for-money trade-off was promoted by many of the lawyers working for Native claimants before the commission, who often assumed that extinguishment had taken place and did not question government attorneys' allegations of extinguishment.

Moreover, the U.S. Supreme Court has determined that once a claim has been brought to the icc and an award made, final adjudication of the case has occurred, and all tribal Aboriginal rights are extinguished.¹⁵⁰ This is so even if extinguishment is only assumed, not proven, in commission proceedings.¹⁵¹ The injustice of such finality based on assumptions was exacerbated by the fact that the icc allowed any individual member of a tribe to file claims on behalf of the tribe without any formal authorization of the tribe as a whole. The commission never investigated whether an individual presenting a claim had authority to do so, and tribes that attempted to intervene in commission hearings or to sue to prevent the hearing taking place were unsuccessful. Attempts to challenge icc decisions before the courts because of the commission's refusal to hear the representative bodies of the tribes concerned have been rejected.

Further, although the commission was set up as an independent fact-finding body, its rules and procedures rendered it more of a court, and commission proceedings were as adversarial and drawn-out as proceedings in the courts.¹⁵²

Ultimately, the commission appears to have been but another element of the termination policy in the United States, the goal of which was assimilation of members of Native tribes.

The failings of the U.S. Indian Claims Commission must be examined closely in creating a model for such a tribunal in Canada. For example, to avoid such shortcomings, the Canadian

model must ensure wide remedial powers for the tribunal. Also, steps must be taken to ensure that the commission is required to determine whether there is sufficient support for a claim from the members of the First Nation affected. A Canadian model should have and should make full use of its independent investigative function.

We note that in Canada the creation of such a tribunal has been proposed in the past, albeit in a limited form. Two joint committees of the Senate and the House of Commons on Indian affairs, one in 1946-1948 and one in 1959-61, proposed the creation of an Indian claims commission. In 1969 Dr. Lloyd Barber was appointed Indian claims commissioner pursuant to a recommendation in the 1969 white paper. In 1983 the House of Commons Special Committee on Indian Self-Government recommended establishment of a specialized tribunal to decide disputes in relation to agreements between First Nations and other governments.¹⁵³ The 1988 report of the Canadian Bar Association Committee on Aboriginal Rights in Canada recommended that the government proceed with creation of a legislatively based specific claims tribunal with a mandate to adjudicate the resolution of specific claims.¹⁵⁴

The Indian Claims Commission, whose role we touched on briefly earlier in the paper, performs some of the investigative functions that we believe are crucial to the success of a commission. The tribunal we propose could perhaps function in conjunction with the commission or could result from a significant expansion of the role of the commission.

We also recommend that educational courses be offered to judges of all courts of Canada and the provinces to sensitize them to the history, cultures and points of view of Aboriginal peoples.

5. *Institute mandatory review of federal and provincial statutes, regulations and policy to bring them into line with the law as stated by the courts in Aboriginal matters*

Changes to and clarifications of the law made in court judgements must be reflected in statutes, regulations and policy. The government itself must adopt a large and liberal interpretation of these judgements. For this process to take place we recommend that government statutes, regulations and policy directed to matters or activities related to Aboriginal peoples and Aboriginal or treaty rights be reviewed annually.¹⁵⁵ This should avoid constant attempts by government to enforce legislative or regulatory provisions that clearly do not have application to Aboriginal peoples.

We also recommend that agents of the Crown who are in close contact with Aboriginal people, such as wildlife officers, be given training in the history and cultures of the Aboriginal peoples with whom they are in contact. Such agents should also be familiar with the terms of treaties to which those Aboriginal peoples are signatories.

6. *Place a moratorium on multiple charges for similar offences*

First Nations that are already undertaking the defence of members charged with quasi-criminal offences on the basis of Aboriginal or treaty rights should not have to bear the increased administrative and financial burden caused by the laying of further charges on the same people or other members of the community for similar activities. This practice places a tremendous financial burden on the First Nations concerned; it lengthens and hinders an already complicated trial on the principal issues by adding numerous charges and parties. We recommend that where multiple charges have already been filed against members of an Aboriginal community, and where the Crown is aware that these charges will be defended on the basis of Aboriginal or treaty rights, there be a moratorium on any further accusations based on similar fact situations until such time as the issue has been determined definitively by the courts.

7. *Legislate to allow retention of jurisdiction by the courts in complex cases*

In some of the more complex cases involving Aboriginal or treaty rights, the courts have provided general guidance but have left it to the parties to resolve particular issues. If those issues cannot be resolved, the parties are often forced to institute new proceedings. In some cases it may be beneficial to have the original court hearing the case retain jurisdiction to resolve related contentious questions that cannot be resolved by the parties and ensure compliance with the judgement. We recommend that the government of Canada introduce legislation enabling the courts, including the Supreme Court of Canada, to retain jurisdiction to ensure compliance with decisions and create remedies in the event of non-compliance.

8. *Introduce changes in the test-case funding program*

The test case funding program must be changed dramatically. Administration of the program should be taken out of the hands of the department of Indian affairs. We recommend that an independent body administer the funding.¹⁵⁶ The body proposed in recommendation 2 would be

an appropriate administrator for the test case fund. The fund must be made available to Aboriginal people at the trial level and should cover the cost of expert witnesses. Test case funding should also be made available to First Nations organizations that seek to intervene in cases involving Aboriginal or treaty rights.

Moreover, the amount of money allocated to test case funding must be increased dramatically. We recognize that in times of economic hardship it is difficult for the government to find more money to allocate. However, there can be no question that the relative economic positions of the two main players in Aboriginal litigation — the government and members of First Nations — are disparate. Governments have far more money and resources to invest in litigation. This disparity results in an unbalanced situation before the courts.

9. Disclose amount of public funds allocated to litigating against Aboriginal people

While governments have notoriously deep pockets and can afford to go all out in litigating cases, it is important that First Nations know exactly how much the government spends on litigation against Aboriginal people. We recommend that the federal and provincial governments, after relevant review, disclose on a yearly basis, and possibly on a case by case basis, the amount of public funds allocated to litigating against Aboriginal people, including the cost of internal lawyers' time. Only with such figures in hand can First Nations know the commitment their opponent is making against their interests and the case they have to meet.

10. Take steps to ensure that procedural fair play is maintained

Lawyers litigating for the Crown must ensure that the Crown's fiduciary duty is fulfilled. This involves ensuring, for instance, that in procedural matters Aboriginal people are always treated fairly. We recommend that the department of justice publicly disavow the use of procedural technicalities to defeat claims by Aboriginal peoples. Consideration might be given to incorporating, in a professional code of conduct, appropriate directives on how the conduct of advocates would best reflect the fiduciary duty toward Aboriginal peoples.

Notes

- ^{1.} *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1108. The fiduciary relationship is explored further later in this paper.
- ^{2.} [1973] S.C.R. 313.
- ^{3.} See, for instance *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 376, 387.
- ^{4.} Madam Justice Wilson of the Supreme Court of Canada, in her judgement in this case, stated that "it was quite apparent that...the Crown renounced the defence both at trial and through ministerial statements made out of court." ([1984] 2 S.C.R. 335 at 353) Madam Justice Wilson went on to say that "the Crown's tactics in this regard left a lot to be desired" and that the Crown's behaviour did not "exemplify the high standard of professionalism we have come to expect in the conduct of litigation".
- ^{5.} *Indian Act*, R.S.C. 1927, c. 98, s. 141, repealed by the *Indian Act* 1951, c. 29.
- ^{6.} (1993), 104 D.L.R. (4th) 470 (B.C.C.A.).
- ^{7.} Cited in note , pp. 346-347.
- ^{8.} (1929) 1 D.L.R. 307 (Co. Ct.).
- ^{9.} As quoted by Chief Justice Dickson in *Simon*, [1985] 2 S.C.R. 387 at 399.
- ^{10.} *Sparrow*, cited in note , p. 1106.
- ^{11.} For a discussion of the devastating effects of European diseases on the Aboriginal population of the American continent see Georges Sioui, *For an Amerindian Autohistory*, particularly chapter 1, "Disease Has Overcome the Devil" (Montreal: McGill-Queen's University Press, 1992). Sioui asserts that "over a 400-year period beginning in 1492, the aboriginal population of the American continent shrank from 112 million to approximately 5.6 million.... As for North America alone, of its 18 million Amerindian inhabitants at the time of European contact, by 1900 only 250,000 to 300,000 inhabitants remained."
- ^{12.} For example, see pp. 108-115 of the *Atlas of Great Lakes Indian History*, where Aboriginal participation in the War of 1812 is noted. See also the correspondence between British and American plenipotentiaries during negotiations for the Treaty of Ghent in which the British explain their obligation to include the First Nations in the treaty ending the war: British Statements Number 2 and 4, in *Diplomatic Correspondence of the United States, Canadian Relations, 1784-1860*, ed. William R. Manning (Carnegie Endowment for International Peace, 1940).
- ^{13.} 31 U.S. (6 Peters) 515 (1832) at 548.

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- ¹⁴. See also *Cherokee Nation v. State of Georgia* 30 U.S. (5 Peters) 1 (1831); *Goodell v. Jackson* 20 Johns. 693 (1823) (N.Y. Court for the Correction of Errors), especially at 711.
- ¹⁵. *Re Eskimos*, [1939] S.C.R. 104; *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577; *R. v. Sioui*, [1990] 1 S.C.R. 1025.
- ¹⁶. "Report of the Select Committee of the House of Commons (U.K.) on the Aborigines of the British Settlements, 26th June 1837", quoted in *Report on the Affairs of the Indians in Canada*, cited in note , appendix T, paragraph 1, General Recommendations (emphasis added).
- ¹⁷. *Report on the Affairs of the Indians in Canada*, Sessional Paper No. 2, Volume 4, Journals of the Legislative Assembly, 1847, Appendix T.
- ¹⁸. Senate Resolution of December 1867, quoted in *Re Eskimos*, cited in note , p. 108. See also section 2(e) of the *Quebec Boundaries Extension Act*, S.C. 1912, c. 45 and the *Quebec Boundaries Extension Act*, S.Q. 1912, c. 7.
- ¹⁹. *Guerin*, cited in note , p. 387.
- ²⁰. *Sparrow*, cited in note , p. 1108.
- ²¹. *Sparrow*, pp. 1109 and 1119 (emphasis added).
- ²². *Sparrow*, p. 1110 (emphasis added).
- ²³. *Blatchford v. Native Village of Noatak* 111 S. Ct. 2578 (1991) at 2589, Blackmun, Marshall and Stevens dissenting, but not on this point.
- ²⁴. "Understanding Aboriginal Rights", *Canadian Bar Review* 66 (1987), p. 755.
- ²⁵. *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 12 August 1991), pp. 160-161 (cited hereafter as *Report of the Aji*).
- ²⁶. See letter filed as Exhibit 9, T. 80 in *In the Matter of Barristers and Solicitors Act*, R.S. 1979, c. 26 and *Harvey Gansner* (27 June 1991), Vancouver J900127 (S.C.B.C.) at 101. The letter, from Rem Westland (acting director, specific claims), states, in part: "I remind you that your evaluation will include a statement on how this negotiation went. Your challenge is to settle at below the preferred level, or at the preferred level if necessary.... [Y]our strongest positions are either to settle under, or at, the preferred level; or, to close down negotiations before you expect to be defeated by the mandate itself." Copy on file with the authors and with the Royal Commission on Aboriginal Peoples [cited hereafter as Authors'/Rcap files].

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27. See the government of Canada's status report on comprehensive claims dated 21 September 1992. Authors'/Rcap files.
28. See Vic Savino, "The 'Blackhole' of Specific Claims in Canada: Need it Take Another 500 Years?", paper presented to the Canadian Bar Association Continuing Legal Education Seminar, Winnipeg, Manitoba, 28-29 April 1989. Unfortunately, more up to date figures are not available from the department of Indian affairs. A spokesperson for the department informed us that these figures were no longer available and that, if they were, they would not be made public.
29. Since 1991 the Indian Claims Commission has had jurisdiction to investigate rejected specific claims and recommend whether the government should accept them for negotiation. The government is not strictly bound by these recommendations.
30. See, for example, the reasons of the majority in *Delgamuukw v. The Queen*, cited in note . See also the factum of Her Majesty the Queen before the Supreme Court of Canada in *R. v. Sparrow*, cited in note , where it was urged that "the Appellant [Sparrow] required to adduce extensive and well-substantiated evidence [to discharge the burden of proof of the factual existence of the Aboriginal right asserted]".
31. The courts have recognized that the inequality between the Crown and First Nations should give rise to certain presumptions such as the presumption that First Nations treaties should be given a wide and liberal interpretation in favour of First Nations signatories and that any ambiguities should be resolved in favour of the First Nations signatories.
32. *A.G. Ontario v. Bear Island Foundation* (1984), 58 D.L.R. (4th) 321 (Ont. H.C.) at 334-336; *Sparrow*, cited in note , p. 1112.
33. William B. Henderson, "Evidentiary Problems in Aboriginal Title Cases", in *Applying the Law of Evidence*, Special Lectures of the Law Society of Upper Canada 1991 (Toronto: Carswell, 1992), p. 166. Henderson's paper is an in-depth analysis of the evidentiary problems and issues associated with the pleading of cases based on Aboriginal title.
34. An exception to this rule is the case of *R. v. Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182 (Ont. C.J.), where the Ontario government conceded that the Aboriginal defendants had "some sort" of Aboriginal right to fish commercially. We would add, however, that a vague admission of "some sort" of right does not necessarily shorten a trial.
35. Factum of Her Majesty the Queen in Right of Canada, cited in note , p. 44, paragraph 87.
36. For example, according to the 1986 census, the employment rate among Indian people was only about half that of the general population of Canada; correspondingly, the proportion of Indian persons whose major source of income was government transfer payments was more than two times that of the general population. The overall result was that the average individual income of Indian people was about half that of the general

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- population. (1986 *Census Highlights on Registered Indians: Annotated Tables*, pp. 20-21, 24-27) See also B.D. Morse, "Aboriginal Peoples and the Law", in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, ed. B.D. Morse (Ottawa: Carleton University Press, 1985), pp. 5-7.
37. Letter from Dan Goodleaf, deputy minister of Indian affairs, to Jerry Peltier, grand chief of the Mohawks of Kanesatake, 28 October 1993. Authors'/rcap files.
38. S. Barry Cottam, "Indian Title as a "Celestial Institution": David Mills and the *St. Catherine's Milling Case*", in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, ed. K. Abel and J. Friesen (Winnipeg: University of Manitoba Press, 1991), p. 260. See also Anthony J. Hall, "*The St. Catherine's Milling and Lumber Company versus the Queen*: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth Century Canada", in the same volume. These two essays provide a detailed analysis and summary of the case and the politics surrounding it.
39. For instance, in *Guerin v. The Queen*, cited in note , the court ruled that the source of Aboriginal title was not the *Royal Proclamation of 1763* as had been held by the Judicial Committee of the Privy Council in *St. Catherine's Milling*.
40. Cottam, cited in note , p. 248.
41. Cottam, p. 248.
42. Cottam, footnote 9, p. 262.
43. Hall, cited in note , p. 281.
44. Donald B. Smith, "Aboriginal Rights a Century Ago", *The Beaver* 67/1 (February/March 1987), pp. 13-14.
45. Alexander Morris, *The Treaties of Canada With the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House, 1991).
46. Hall, cited in note , p. 278.
47. Hall, p. 278.
48. The judgement at trial is reported in (1984), 15 D.L.R. (4th) at 321; at the Court of Appeal in (1989), 58 D.L.R. (4th) 117; and in the Supreme Court of Canada in [1991] 2 S.C.R. 570.
49. See the factum of the Teme-Augama Anishnabay to the Ontario Court of Appeal, case cited in note , pp. 174-176, showing the text of a letter from counsel for the attorney general of Ontario to counsel for the appellants. Authors'/Rcap files.

⁵⁰. This was a finding of fact made by the trial judge; see (1984), 15 D.L.R. (4th) 321 at 425. See also Appendix B of the factum of the Teme-Augama Anishnabay to the Supreme Court of Canada, case cited in note , which contains references to repeated assertions to this effect by various Canadian officials and ministers.

⁵¹. After representation by the province's solicitor it was decided that the enabling statute did not provide for this type of case to be heard by the board of arbitrators.

⁵². Letter from Judd Buchanan, minister of Indian affairs, to Lloyd Barber, commissioner of Indian claims, 7 January 1975 (Exhibit No. 13-146 in Appellants' Supplementary Case on Appeal to the Supreme Court of Canada in *Ontario v. Bear Island*, cited in note , #21435). Authors'/Rcap files. This letter was in response to a letter from Mr. Barber requesting that the government state whether it agreed with the position of the Teme-Augama Anishnabay that they were not parties to the Robinson-Huron Treaty of 1850 and wanting to know whether the government was prepared to negotiate a settlement. (Exhibit No. 13-145)

⁵³. The trial judgement is reported at [1991] 5 C.N.L.R. 1.

⁵⁴. In fact, the province also filed a motion to have the appeal suspended indefinitely to allow them to negotiate with the appellant First Nations. This motion was opposed by the Gitksan and Wet'suwet'en and the Assembly of First Nations, an intervener in the case. The court refused to grant the suspension as requested but delayed the start of the appeal for a period of one month to allow the government's new counsel to prepare for the appeal and file a new factum.

⁵⁵. Letter from James Macaulay, counsel for the attorney general of Canada, to all parties in the *Delgamuukw* appeal, 27 April 1992. Authors'/Rcap files. The letter stated that the attorney general of Canada would incorporate in its factum the following parts of the province's earlier factum: the argument relating to the evidentiary issues on the appeal; the arguments that the trial judge had not erred in his assessment of the opinion evidence (except two paragraphs thereof); the response to the appellants' argument that the trial judge had erred in his determination of the area over which they had Aboriginal rights (except a few paragraphs thereof); the argument that the trial judge had not erred in finding that beaver trapping territories arose as a result of the fur trade (with one paragraph altered); and the argument that the trial judge had not erred in rejecting the appellants' claim for jurisdiction and ownership and that consent was not necessary for the extinguishment of Aboriginal rights. The attorney general of Canada also incorporated five of the province's earlier appendices, with slight alterations.

⁵⁶. There were also a number of interveners involved in this appeal; some intervened in support of the First Nations appellants and others in support of the respondents.

⁵⁷. *Manitoba Metis Federation v. A.G. Canada*, [1988] 3 C.N.L.R. 39. The attorney general also sought costs.

⁵⁸. P. 48, per O'Sullivan J.A., dissenting but not on this point. See also p. 46, per Twaddle J.A.

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59. See (1973), 42 D.L.R. (3d) 8.
60. (1973), 39 D.L.R. (3d) 45.
61. (1973), 39 D.L.R. (3d) 81.
62. 34 N.B.R. (2d) 382.
63. Thus, according to the federal government's position, the Aboriginal peoples would have had to defend one action against cp on the basis of their rights in the land in the Supreme Court of New Brunswick, and would have had to bring an entirely new proceeding in the Federal Court to argue their counterclaim. The expense and inconvenience to the First Nation that would have resulted are obvious.
64. [1988] 2 S.C.R. 654.
65. (1983), 2 D.L.R. (4th) 22 at 37.
66. In Quebec, the *Fisheries Act* and regulations are administered by the province; it remains federal legislation.
67. Letter from Robert Marchi to Hutchins, Soroka & Dionne, 1 September 1993. Authors'/Rcap files.
68. *Fiduciary Relationship of the Crown With Aboriginal Peoples: Implementation and Management Issues a Guide for Managers*, Report of the Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, July 1993, pp. 34-35.
69. *R. v. Wolfe*, [1993] 2 C.N.L.R. 180 (Sask. Prov. Ct.). Appeal dismissed by the Court of Queen's Bench of Saskatchewan, Action No. Q.B.CR.AP.29/92. An appeal to the Court of Appeal for Saskatchewan has been heard. Our account of this case is taken from the judgement of the Provincial Court for Saskatchewan, the brief of law submitted by the Crown to the provincial court, and the factum filed by the defendants/appellants in the Court of Queen's Bench.
70. The investigator himself testified that at his initial meeting with one of the defendants on
17 February 1990, it was arranged that he would visit the defendant on the reserve on 22
February 1990; however, when he made that visit the defendant informed him that he had
no wild meat available because he had been drunk since their meeting on the 17th. The
consumption of Listerine is also indicative of a problem with alcohol.
71. Morris, *Treaties*, cited in note , pp. 185 and 215.
72. Counsel for the defendants/appellants stated in his memorandum of argument, paragraph 97, that the conduct of the Crown agents amounted to "exploitation by the Crown of the

most serious problem from which Indian people suffer, the abuse of alcohol".
Authors'/Rcap files.

73. [1992] 4 C.N.L.R. 121 at 138-139.

74. (9 April 1986), (Alta. Prov. Ct.) [Unreported]; appeal dismissed by the Alberta Court of Queen's Bench (20 October 1986), Grand Prairie 8604-0010-53 A02 (Alta. Q.B.).

75. Letter from André Maltais, associate secretary general, to René Simon, president, Conseil des Atikamekw et des Montagnais, 5 October 1992. The letter states in part: "Enfin, j'aimerais vous rappeler comme cela a été mentionné à plusieurs reprises à la table des négociations, qu'un débat judiciaire sur la question des droits ancestraux entraînerait une suspension, sinon un terme, à ces négociations."

76. A letter was sent to the government by René Simon, president of the Conseil des Atikamekw et des Montagnais on or about 25 February 1993. Authors'/Rcap files. The minister of Aboriginal affairs, Christos Sirros, responded on 25 May 1993, stating that the raising of Aboriginal rights as a defence to the charges would not affect the negotiations in any way.

77. Such is the case, for instance, in the Listuguj Mi'gmaq First Nation and the Eagle Village First Nation Algonquins. More than 50 members of each community face a variety of accusations based on essentially the same facts (fishing without a licence, fishing with minnows, or selling of fish).

78. [1987] 5 W.W.R. 115 (Prov. Ct.), [1989] 4 C.N.L.R. 128 (Q.B.), [1991] 1 C.N.L.R. 140 (C.A.). This situation is considered in more detail later in this paper.

79. Letter from Jean Charest, minister of the environment, to counsel for the Crees, 20 January 1992. Authors'/Rcap files.

80. Letter from John Crosbie, minister of fisheries and oceans, to Jean Charest, minister of the environment, 15 September 1992. Authors'/Rcap files.

81. Letter from Michel Dorais, federal administrator, James Bay and Northern Quebec Agreement, to Chief Billy Diamond, 26 November 1992. Authors'/Rcap files.

82. [1987] 3 C.N.L.R. 70.

83. [1989] 4 C.N.L.R. 128.

84. *R. v. Arcand*, [1989] 2 C.N.L.R. 110.

85. [1991] 1 C.N.L.R. 140. The Court also made an order for costs against the Crown to the intervener, the Assembly of First Nations, in the appeal; Mr. Flett's costs had already been covered under an agreement with the Crown.

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- ⁸⁶. *Report of the Aji*, cited in note , volume 1, "The Justice System and Aboriginal People", p. 158.
- ⁸⁷. *Report of the Aji*, volume 1, p. 159.
- ⁸⁸. *Simon*, cited in note . The question before the court was whether the Treaty of 1752 was a treaty for purposes of section 88 of the *Indian Act*. Section 35(1) of the *Constitution Act, 1982* was not invoked by the Mi'kmaq defendant (the charge predated the coming into force of the 1982 constitution), and although a constitutional question in relation to section 35 was framed by the chief justice, the court decided an answer was not necessary for the determination of the appeal.
- ⁸⁹. *Simon*, p. 401.
- ⁹⁰. *Simon*, p. 404.
- ⁹¹. Excerpt from the unrevised verbatim transcript of the meeting (p. 39), provided to the authors by the Union of Nova Scotia Indians. Authors'/Rcap files.
Representatives of unsi have given the authors a great deal of documentation about the conduct of the provincial and federal governments after the *Simon* decision was rendered. The authors also attended a day-long meeting with representatives of unsi, the Native Council of Nova Scotia, and the Confederacy of Mainland Mi'kmaqs. The discussion that follows is the result of this meeting and an examination of the documentation.
- ⁹². In its judgement in *Sparrow*, cited in note , the Supreme Court of Canada concluded that the government had an obligation to consult with Aboriginal peoples when regulating the exercise of their Aboriginal and treaty rights. While this judgement was released only in May 1990, the solemn promise contained in subsection 35(1) of the *Constitution Act, 1982* could not be ignored by governments until such time as the Supreme Court pronounced on its precise content.
- ⁹³. *Paul v. The Queen*, [1981] 2 C.N.L.R. 83 (N.B.C.A.); and *R. v. Googoo*, [1987] 2 C.N.L.R. 137 (N.S.P.C.).
- ⁹⁴. Authors'/Rcap files.
- ⁹⁵. Authors'/Rcap files.
- ⁹⁶. Authors'/Rcap files.
- ⁹⁷. The Nova Scotia government also ignored socio-economic factors in planning the moose hunt. Hunting is of great spiritual and cultural importance to Mi'kmaq people. Moreover, as the Union of Nova Scotia Indians pointed out in an internal memo, the Mi'kmaq people needed the moose harvest essentially for nutritional purposes, as approximately two-thirds of the Mi'kmaq population of Nova Scotia was receiving social assistance, and unemployment rates on reserves ranged from 60 to 80 per cent.

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- ⁹⁸. Letter from John Mullally, deputy minister, Nova Scotia department of lands and forests, to Alex Christmas, president, Union of Nova Scotia Indians, 13 September 1988; and Department of Lands and Forests, press release, 14 September 1988. Authors'/Rcap files.
- ⁹⁹. Letter from Alex Christmas, president, Union of Nova Scotia Indians, to Bill McKnight, minister of Indian affairs, 16 September 1988. Authors'/Rcap files.
- ¹⁰⁰. Authors'/Rcap files.
- ¹⁰¹. See section beginning on page .
- ¹⁰². The argument that the Treaty of 1752 had been terminated by subsequent hostilities was also made by Nova Scotia in other cases; see, for instance, *R. v. Laurie Dorey*, cited in note .
- ¹⁰³. *R. v. Laurie Dorey*, Provincial Court of Nova Scotia, Submissions filed on behalf of the Crown on July 7, 1989. These submissions were sent to the authors by the office of the attorney general of Nova Scotia and are on file with the authors. The authors have not been able to find a docket number for this case.
- ¹⁰⁴. In fact it is clear that treaty rights cannot be extinguished unilaterally by the Crown; see *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1063. In *Simon* the Supreme Court of Canada stated explicitly that it did not want "to be taken as expressing any view on whether, as a matter of law, treaty rights may be extinguished". (p. 407)
- ¹⁰⁵. Letter from D. Bruce Clark to Alison W. Scott, 27 November 1989. Authors'/Rcap files.
- ¹⁰⁶. [1990] 2 C.N.L.R. 115. The federal Crown filed an application for leave to appeal the decision in *Denny* to the Supreme Court of Canada. A few months after the application for leave was filed, the Crown discontinued its appeal.
- ¹⁰⁷. Letter from Thomas McInnis, attorney general of Nova Scotia, to Dwight Dorey, Vice President, Native Council of Nova Scotia, 2 April 1990. Authors'/Rcap files.
- ¹⁰⁸. This was acknowledged, at least in a limited fashion, in the report of the Interdepartmental Working Group, *Fiduciary Relationship with the Crown*, cited in note , p. 35. Referring to the National Procedural Guidelines for Enforcement of Aboriginal Fishing for Food, Social and Ceremonial Purposes of the department of fisheries and oceans, the report states that "the new guidelines may require periodic review to reflect any changes in the law based on decisions by appellate courts and to reflect the changing relationships of the Department with aboriginal groups".
- ¹⁰⁹. *Indian Act*, cited in note .
- ¹¹⁰. Brian Slattery, "A Theory of the Charter", *Osgoode Hall Law Journal* 25/4 (1987), p. 701. This essay explores the effects of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*) on legislative and governmental conduct and concludes that the Charter mandates the governments and legislatures to undertake

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- constitutional review of their own behaviour. We would apply this same reasoning to Part II of the *Constitution Act, 1982*.
111. Slattery, "A Theory", cited in note , pp. 707-709.
112. *Calder*, cited in note .
113. *Calder*, p. 333.
114. *Calder*, p. 404.
115. *Sparrow*, cited in note , pp. 1098-1099. For a recent interpretation of the meaning of 'clear and plain intention to extinguish', see *Delgamuukw v. A.G.B.C.*, cited in note . In that case the B.C. Court of Appeal determined that this intention could be either express, or manifested by unavoidable implication, that is, if the only possible interpretation of the statute were that Aboriginal rights were intended to be extinguished. In his dissenting reasons, Mr. Justice Lambert suggested that a clear and plain intention to extinguish Aboriginal rights must be expressed legislatively (pp. 181, 197).
116. *Sparrow*, p. 1097.
117. Letter from L. Fraikin, director general, comprehensive claims, to Graham Allen, legal counsel for the Sechelt Band, 20 June 1988. The letter sets out the government's reasons for refusing to accept the claim of the Sechelt First Nation for negotiation. In April 1991 the federal government reversed its decision and accepted the Sechelt comprehensive claim for negotiation. In December 1991, Canada agreed to negotiate with all B.C. First Nations. Authors'/Rcap files.
118. Telephone conversation with Kathy Greene, program development and policy, comprehensive claims branch, Indian and Northern Affairs Canada, 4 November 1993.
119. *Williams v. Canada*, [1992] 1 S.C.R. 877.
120. In the fall of 1993, Revenue Canada delayed implementation of the *Williams*-based taxation guidelines until 1 January 1995.
121. *McNab v. Canada*, [1992] 4 C.N.L.R. 52.
122. *Courtois v. Canada*, [1991] 1 C.N.L.R.40.
123. *Cherokee Nation v. Georgia*, cited in note . See also *Felix Cohen's Handbook of Federal Indian Law*, 1982 edition (Charlottesville: The Michie Co., 1982), pp. 220-228, which provides a useful summary of the case law on the trust responsibility in the United States. The authors state that "the trust relationship is one of the primary cornerstones of Indian law". (p. 221)

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124. For a general overview of the role of the United States in such litigation, see *Cohen's Handbook*, cited in note , pp. 308-311; and William Canby Jr., *American Indian Law in a Nutshell*, second edition (St. Paul: West Publishing Co., 1988), pp. 43-52.
125. It should be noted that tribes in the United States have also criticized the u.s. government for its failure to defend their interests adequately in litigation; in fact, many Aboriginal groups prefer to have their interests represented by their own counsel as co-plaintiffs in suits brought by the United States on their behalf. However, this does not alter the fact that, at least in the United States, such intervention is frequently undertaken on behalf of tribes by the u.s. government, which is clearly not the case in Canada.
126. [1989] R.J.Q. 642 (C.S.); (18 September 1991), J.E. 91-1492 (C.A.); (26 August 1993), Montreal 700-05-000369-870 (C.S.).
127. *U.S. v. State of Washington*, 384 F. Supp. 312 (1974); *U.S. v. Santa Fe Pacific Rlrd.*, 314 U.S. 339 (1941); *U.S. v. Pend Oreille Cty. Pub. Util. Dist.*, No. 1 585 F. Supp. 606 (1984).
128. *Cohen's Handbook*, cited in note , p. 308; *Heckman v. United States*, 224 U.S. 413 (1912).
129. 388 F. Supp. 649 (D. Me., 1975) at 662, aff'd 528 F. 2d 370 (1st Circ., 1975).
130. *Blatchford v. Native Village of Noatak*, cited in note .
131. Information about the federal government's participation in the Cayuga claim was received during a telephone conversation with Curtis Berkey, director, Indian Law Resource Center, Washington, D.C.
132. R.E. Johnny, "Can Indian Tribes Afford to Let the Bureau of Indian Affairs Continue to Negotiate Permits and Leases of Their Resources?", *American Indian Law Review* 16 (1991), p. 203.
133. *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); *Scholder v. United States*, 428 F.2d 1123 (9th Circ.), cert. denied, 400 U.S. 942 (1970); *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp 252 (D.D.C., 1972); Canby, cited in note , pp. 45-47.
134. *Scholder*, cited in note , p. 1130.
135. Canby, cited in note , p. 47.
136. *Pyramid Lake Paiute Tribe*, cited in note , p. 256.
137. *Nevada v. U.S.*, 463 U.S. 110, Renquist J., at 128.
138. In Canada it appears that the Supreme Court of Canada has taken a different approach to review of executive decisions affecting the rights of First Nations on the basis of the fiduciary duty. In *Guerin v. The Queen*, the court reviewed the conduct of the

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- government of Canada with respect to its actions in leasing part of the land of the Musqueam First Nation and ordered the government to pay damages of \$10 million.
139. *Cohen's Handbook*, cited in note , p. 597; Lloyd Burton, *American Indian Water Rights and the Limits of the Law* (Kansas: University Press of Kansas, 1991)p. 47.
140. 116 Congressional Record 23258, 23261 (1970); see also Canby, cited in note , p. 49.
141. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. 363, 91st Congress, second session (1970).
142. S. 2451, 101st Congress, second session; Robert Clinton et al., *American Indian Law: Cases and Materials*, third edition (Charlottesville: The Michie Co., 1991), pp. 269-270. The 1990 bill was not enacted. According to an official at the bia, it died in the Banking Committee.
143. Rules of the Supreme Court of Canada, r. 32.
144. See, for instance, *Code of Civil Procedure*, R.S.Q. c. C-25, s. 95, 98; *Federal Court Act*, R.S.C. 1985, c. F-7, s. 57; *Courts of Justice Act*, S.O. 1984, c. 11, s. 122.
145. See, for example, *Re Tandy Electronics Ltd. and United Steelworkers of America*, [1980] 1 Can. L.R.B.R. 99 (Ont. L. R. B.) and (1980) 115 D.L.R. (3d) 197 (OHCJ).
146. *Indian Claims Commission Act* 1946, 25 U.S.C.A. ss. 70-70v. See, generally, Canby, cited in note , pp. 264-268, and P. Cumming and N. Mickenberg, ed., *Native Rights in Canada*, second edition (Toronto: The Indian-Eskimo Association of Canada, 1972), pp. 243-264.
147. Cumming and Mickenberg, cited in note , p. 259.
148. For analysis and criticisms of the Indian Claims Commission's legacy, see H.D. Rosenthal, "Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission", in *Irredeemable America: the Indians' Estate and Land Claims*, ed. I. Sutton (Albuquerque: University of New Mexico Press, 1985), p. 35; and "The Indian Claims Commission: Politics as Law", in *Partial Justice: Federal Indian Law in a Liberal Constitutional System*, ed. P.T. Shattuck and J. Norgren (Providence: Berg Publishers, 1991), p. 141.
149. Shattuck and Norgren, cited in note , p. 149.
150. *United States v. Dann*, 470 U.S. 39 (1985); rev'g 873 F.2d 1189 (1989) (C.A. 9th Circ); see also *United States v. Gemmill*, 535 F.2d 1145 (C.A. 9th Circ), cert. denied, 429 U.S. 982.
151. In the first *Dann* ruling the Court of Appeals had ruled that the Western Shoshone had Aboriginal title to the area in question despite an award having been made by the Indian

Claims Commission. The reasoning was, in part, that extinguishment had not been litigated in the commission proceedings but only assumed. (*U.S. v. Dann* 572 F.2d 222 (9th Circ., 1978) and 706 F.2d 919 (9th Circ., 1983)) The Supreme Court reversed and ruled, *inter alia*, that issues that "touch" the matter previously litigated before the commission are considered to have been barred statutorily from being litigated before the courts. The court ruled that an award by the commission barred further suit based on issues that "touched" the issue before the commission, even though the commission award had not been distributed (470 U.S. 39 at 45).

- 152. Shattuck and Norgren, cited in note , p. 149.
- 153. Canada, House of Commons, *Indian Self-Government in Canada*, Second Report of the Special Committee on Indian Self-Government (Penner Report), recommendation 22.
- 154. Canadian Bar Association, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: 1988), recommendation 24.
- 155. Some attempts have been made to make necessary consequential amendments to legislative instruments pursuant to specific treaty undertakings. This was done, for example, in the case of the James Bay and Northern Quebec Agreement. The *Canadian Laws Offshore Application Act* is an example of a federal statute of general application that takes into account Aboriginal and treaty rights. Section 20 of the act provides that "Nothing in this Act shall be constructed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*". This provision was included, however, only after insistence by Aboriginal peoples themselves. See also section 3(2) of the act.
- 156. This suggestion has been made before, for instance, by the Canadian Bar Association in *Aboriginal Rights in Canada: An Agenda for Action*, cited in note.